TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 512.

JAMES CONNORS, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

FILED MARCH 13, 1895.

(15,276.)

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the district court of the United States for the district of Colorado, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you or some of you, between The United States, plaintiff, and James Connors, defendant, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done

Seal of the Supreme Court of the United States.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 15th day of February, in the year of our Lord one thousand eight hundred and ninety-three.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed, but supersedeas denied, by—

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

2 UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

In obedience to the command of the within writ, I herewith transmit to the honorable the Supreme Court of the United States a duly certified transcript of the record and proceedings in the above-entitled cause, together with all things concerning the same.

Seal United States District Court, District of Colorado.

Witness my hand and the seal of the district court of the United States for the district of Colorado, at Denver, in said district, this 20th day of February, A. D. 1893.

FRANCIS W. TUPPER, *Clerk,*
By CHARLES W. BISHOP,
Deputy Clerk.

3 UNITED STATES OF AMERICA, *ss:*

To the United States, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the district of Colorado, wherein James Connors is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this 15th day of February, in the year of our Lord one thousand eight hundred and ninety-three.

DAVID J. BREWER,
Associate Justice Sup. Court U. S.

4 I accept service of the within this 20th day of February, 1893.

JOHN D. FLEMING,
U. S. Att'y for Colo.

5 UNITED STATES OF AMERICA, *ss:*

In the Supreme Court of the United States.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
JAMES CONNORS, Defendant.
} Petition for a Writ of Error.

To the Honorable David J. Brewer, one of the justices of the Supreme Court:

Your petitioner, James Connors, would most respectfully show unto your honor—

First. That he is the defendant in the above-entitled action.

Second. That as such defendant he was indicted and tried under section 5511 of the Revised Statutes of the United States for interfering with the judges of election, etc., in the United States district court within and for the district of Colorado and convicted by the verdict of the jury drawn, impaneled, and sworn in said cause under said section, and that afterward, on the 6th day of February, A. D. 1893, judgment was entered in said cause upon the verdict of the said jury, and your petitioner was sentenced by the Honorable Moses Hallett, district judge of said court, to be imprisoned in the penitentiary, to wit, the house of correction, situated at Detroit, in the State of Michigan, for the period of fifteen (15) months, and that your petitioner pay costs in said cause.

Third. And your petitioner further says that prior to the
6 trial of said cause he excepted to the sufficiency of the indictment herein by his motion to quash that indictment, which said motion was overruled by the court; to which ruling your petitioner, by his counsel, then and there duly excepted.

Fourth. And your petitioner further says and shows unto your honor that at the trial of said cause upon its merits many errors intervened and were allowed and committed by the trial court, to the great and manifest damage, detriment, and prejudice of your petitioner; that at said trial your petitioner, by his counsel, objected and excepted to many of the rulings of said court; that said rulings related to the construction of said section of the statute, to the examination of the jurors on their *voir dire* touching their fairness, competency, and impartiality as jurors in said cause, and to the evidence requisite and necessary to be given and produced by the Government to insure or warrant a conviction under said section, to the law relating to the production thereof, and to the competency of the evidence offered by your petitioner in his own behalf at said trial and excluded by the court, all of which are here produced and presented by a bill of exceptions made on behalf of your petitioner, and have been settled and allowed by the judge of said district court.

Fifth. Your petitioner in particular specifies the following errors allowed and committed by the trial court at the trial of this cause over and against the exception and objection of your petitioner's counsel:

A. In the court refusing to permit counsel for your petitioner to interrogate the jurors on their *voir dire* touching their competency and impartiality as jurors, in this, that your petitioner's
7 counsel asked one of the jurors the following question: "To what political party do you belong and what were your political affil*l*iations in November, A. D. 1890" (Bill of Exceptions, p. 18). Your petitioner's counsel then wrote out in plain legible handwriting seven questions which he desired to ask of the jurors and handed same to the judge of the trial court, but each and every one of the questions were by the court excluded, and counsel was refused permission to ask the same; which questions are as follows:

Q. Did you take an active part in politics in the general election of A. D. 1890; and, if so, on which side?

Q. Did you take an active part in politics in the last general election of A. D. 1892; and, if so, with which of the parties did you affil*l*iate, and where?

Q. Have you been heretofore or are you now strongly partisan in your political beliefs?

Q. Would your political affil*l*iations or party predilections tend to bias your judgment in this case, either for or against this defendant?

Q. Were you ever at any time a member of what was and is known in the city of Denver, county of Arapahoe and State of Colorado, as the committee of one hundred?

Q. Were you ever, at any time, a judge or clerk of an election; and, if so, when and where, and by what party were you named and appointed?

Q. Are you a member of any political club organized for the advancement of the interests of any political party; and, if so, what party?

B. In refusing to allow your petitioner's counsel, on examination of the witness McKinley, to ask the following questions:

Q. "Are you able to state what would have been the effect upon your own vote and the vote of Mr. Bromley if that precinct had been thrown out?"

Q. "And the integrity and security of Mr. Bromley's seat in the legislature depended on the count in this precinct, didn't it" (meaning the count of the 18th precinct, where the ballot-box in question was stolen)?

8 C. In refusing to allow your petitioner's counsel to show through his witness, Prinn, the official count of the vote of the 18th precinct, in the city of Denver, for the election of 1890, that the Democratic ticket received a much larger vote than ever before in this particular precinct, and that this precinct had been largely Republican in the previous elections (Bill of Ex., p. 33), and refusing to allow your petitioner's witness, Prinn, to answer the following question:

Q. Have you figured up from the returns as canvassed by the board of canvassers for the year A. D. 1890, as shown upon that book, the result of the legislative ticket by counting the votes as returned from the Eighteenth precinct, Fourth ward, of the county of Arapahoe; and, if so, what effect did it have in seating any Democratic member on the legislative ticket? (Bill of Ex., p. 34.)

D. And for instructing the jury, among other things, in these words: "As I understand the position of the counsel for the Government, he wishes you to infer from the circumstance of the defendant's being there at this time that he was there for the purpose of assisting in or of covering the act of taking. The box being found, as it is alleged, in his possession some two hours or more after that time, it must be assumed from this circumstance that he was cognizant of the manner in which and of the person by whom it was taken; and certainly if the box was found in his possession, as stated by the witness Perry, it would seem to be an almost irresistible inference that he knew the person who had taken it and was then endeavoring to conceal it. (Bill of Ex., p. 39.)

E. For refusing to grant your petitioner a new trial, as prayed for by his motion in that behalf, wherein many of the errors
9 herein complained of were set forth in solemn argument in open court and reviewed by the trial judge.

F. And for refusing to arrest the judgment on the verdict rendered by the jurors in this cause, as prayed for in your petitioner's motion in that behalf, wherein it was pointed out and solemnly argued in open court that the indictment herein was insufficient to sustain a conviction, charging the defendant in one count of being guilty, as a principal and as accessory before or after the fact, of the matters and things charged in the indictment, there being nothing in the verdict or in the proceeding to determine in which capacity he was found guilty (Bill of Ex., p. 45); that in and about all the errors and rulings of the court hereinbefore complained of your petitioner, by his counsel, then and there duly excepted.

Sixth. And your petitioner most respectfully submits to your

honor that grave, immediate, and difficult questions of law are contained in the record of this cause herein now presented to your honor which ought, in justice to your petitioner, to be held and considered in error in the Supreme Court of the United States. To the end, therefore, that a writ of error may be issued in this cause to the district court within and for the district of Colorado, your petitioner humbly prays that a writ of error be issued in this cause, as provided by the statutes, removing said cause from said district court to the Supreme Count of the United States, and that an order be made by your honor that such writ shall operate as a stay of all proceedings in this cause and your petitioner be admitted to reasonable bail pending inquiry herein.

A. T. BRITTON,
A. B. BROUNE, *Att'ys.*

10 FEB'Y 14TH, 1893.

Writ of error allowed on this petition & assignment of errors, but all stay of execution & supersedeas denied. This order is made without prejudice to the right of petitioner to apply to the trial judge & make such showing as he can to justify a supersedeas.

DAVID J. BREWER,
Associate Justice.

D. J. B.

11 Pleas in the district court of the United States for the district of Colorado, sitting at Denver.

Be it remembered that heretofore and on, to wit, the 29th day of June, A. D. 1891, the same being one of the regular juridical days of the May term, A. D. 1891, of said court—present, the Honorable Moses Hallett, district judge—the following proceeding was had and entered of record in said court, to wit:

In the Matter of the Grand Jury.

At this day come the members of the grand jury heretofore duly impaneled and sworn as such grand jurors and present to the court here the following true bills of indictment, to wit:

* * * * * * *

UNITED STATES OF AMERICA *vs.* JAMES CONNORS.	824. Indictment for Interfering with a Judge of Election.

(Endorsed:) "A true bill." (Signed) "A. Jacobs, foreman."

And thereupon it is ordered by the court that a bench warrant issue without delay against the said defendant and returnable forthwith.

* * * * * * *

12 And the said indictment is in words and figures as follows, to wit:

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

At the May term of the district court of the United States of America in and for the district of Colorado, in the year of our Lord one thousand eight hundred and ninety-one, begun and held at the city of Denver, within said district, on the first Tuesday in May, in the year of our Lord one thousand eight hundred and ninety-one.

The grand jurors of the United States within and for the district of Colorado, good and lawful men, duly selected, empanelled, sworn, and charged on their oath, present—

That heretofore and on, to wit, the 4th day of November, in the year of our Lord one thousand eight hundred and ninety, at the county of Arapahoe, State of Colorado, and within said district, one James Connors did unlawfully interfere with the judges of election of the Eighteenth voting precinct, in said county of Arapahoe, in the discharge of their duties, which said judges of election were then and there officers of the election for Representative in the Fifty-second Congress of the United States, in accordance with the laws of the State of Colorado and of the United States, and did — and there unlawfully and with force and arms seize, carry away, and secrete

13 the ballot-box containing the ballots of said Eighteenth voting precinct which on said 4th day of November, in the year aforesaid, at said election, had been cast for said Representative in Congress, and did then and there knowingly aid and assist in the forcible and unlawful seizure, carrying away, and secreting of said ballot-box, and did then and there counsel, advise, and procure divers other persons, whose names are to the grand jurors unknown, so to seize, carry away, and secrete said ballot-box, thereby, as aforesaid, interfering with said judges of election of said Eighteenth voting precinct and hindering and preventing them, the said judges of election, from counting the votes which had been cast at said election and from declaring and certifying the result thereof.

Contrary to the form of the statutes of the United States in such case made and provided and against the peace and dignity of the United States of America.

JOHN D. FLEMING,
United States Attorney for Colorado.

(Indorsed:) No. 824. U. S. district court for Colorado. The United States *v.* James Connors. Indictment: Interfering with judges of election, &c., R. S., § 5511. A true bill. A. Jacobs, foreman. Filed June 29, 1891. Francis W. Tupper, clerk.

And afterwards and on, to wit, the 30th day of June, A. D. 1891, the same being one of the regular juridical days of the May

14 term, A. D. 1891, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

UNITED STATES OF AMERICA
vs.
JAMES CONNORS. } 824. Indictment for Interfering with Judges of Election.

At this day comes J. T. Fleming, Esq., district attorney, who prosecutes the pleas of the United States in this behalf, and the said defendant, in his own proper person and by W. B. Felker, Esq., his attorney, also comes.

And thereupon the said defendant is arraigned and this indictment here read to him and he is required to plead thereunto; whereupon the said defendant answers and saith that he is not guilty in manner and form as in and by this said indictment he stands charged; and of this he puts himself upon the country, and the said district attorney doth the like.

And afterwards and on, to wit, the 12th day of February, A. D. 1892, the same being one of the regular juridical days of the November term, A. D. 1891, of said court—present, the Honorable John A. Riner, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

15 UNITED STATES OF AMERICA
vs.
JAMES CONNORS. } 824. Indictment for Interfering with Judges of Election.

At this day comes J. D. Fleming, Esq., district attorney, who prosecutes the pleas of the United States in this behalf, and the said defendant, by Oscar Reuter, Esq., his attorney.

And the motion of the said defendant to quash this said indictment having heretofore come on to be heard and having been argued by counsel and by the court taken under advisement and the court being now sufficiently advised in the premises, it seemeth to the court now here that the said indictment is sufficient in law, and so the said motion is denied.

And afterwards and on, to wit, the 2nd day of March, A. D. 1892, the same being one of the regular juridical days of the November term, A. D. 1891, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

UNITED STATES OF AMERICA
vs.
JAMES CONNORS. } 824. Indictment for Interfering with Judges of Election.

At this day comes J. D. Fleming, Esq., district attorney, and thereupon it is ordered by the court that the said defendant be let to bail for his appearance to answer herein at the next term of court in the sum of twenty-five hundred dollars.

16 And afterwards and on, to wit, the 30th day of July, A. D. 1892, the same being one of the regular juridical days of the

May term, A. D. 1892, of said court—present, the Honorable Moses Hallet, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

UNITED STATES OF AMERICA
vs.
JAMES CONNORS.
824. Indictment for Interfering with a Judge of Election.

At this day comes J. D. Fleming, Esq., district attorney, who prosecutes the pleas of the United States in this behalf, and on his motion it is ordered by the court that the said defendant renew his bail for his appearance to answer herein at the next term of court in the sum of fifteen hundred dollars ($1,500.00).

And afterwards and on, to wit, the 18th day of November, A. D. 1892, the same being one of the regular juridical days of the November term, A. D. 1892, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause to wit:

UNITED STATTS OF AMERICA
vs.
JAMES CONNORS.
824. Indictment for Interfering with Judges of Election.

At this day comes J. D. Fleming, Esq., district attorney, who prosecutes the pleas of the United States in this behalf, and the said defendant, in his own proper person and by W. B.
17 Felker, Esq., his attorney, also comes.

And thereupon the empaneling of a jury is begun and continued to the hour of adjournment.

And afterwards and on, to wit, the 19th day of November, A. D. 1892, the same being one of the regular juridical days of the November term, A. D. 1892, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

UNITED STATES OF AMERICA
vs.
JAMES CONNORS.
824. Indictment for Interfering with Judges of Election.

At this day come again the said parties, by their attorneys respectively, and the said defendant in his own proper person also comes; and thereupon comes a jury, to wit, W. G. Fairhurst, Henry J. Hawley, S. I. Altman, A. T. Edmundson, James Leach, H. C. Lemon, A. S. Baker, C. T. Curnahan, William Adamson, James K. Stuart, Lewis Secore, Mathew McCaslin, twelve good and lawful men, and they are duly selected and tried, impaneled, and sworn to well and truly try and true deliverance make between the United States of America and the prisoner at the bar and a true verdict render according to the evidence.

18 And thereupon comes the evidence, the hearing of which is continued to the hour of adjournment.

And the said jurors, being now each duly cautioned by the court not to converse among themselves or with others touching this cause or the matters at issue herein or the evidence heard or any part thereof nor to listen to such conversation of others, are permitted to retire, to meet the court at its next incoming.

And afterwards and on, to wit, the 21st day of November, A. D. 1892, the same being one of the regular juridical days of the November term, A. D. 1892, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

UNITED STATES OF AMERICA *vs.* JAMES CONNORS. } 824. Indictment for Interfering with Judges of Election.

At this day come again the said parties, by their attorneys respectively, and the said defendant in his own proper person also comes, and, the said jurors being now all here present and in the jury-box, the trial herein is resumed.

And the said jurors, having heard the evidence produced herein and the instructions of the court, retire to their room, under charge of a sworn bailiff, to consider of their verdict.

19 And afterwards and on, to wit, the 22nd day of November, A. D. 1892, the same being one of the regular juridical days of the November term, A. D. 1892, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

UNITED STATES OF AMERICA *vs.* JAMES CONNORS. } 824. Indictment for Interfering with Judges of *Co*llection.

At this day come again the said parties, by their attorneys respectively, and the said defendant in his own proper person also comes.

And thereupon come again the said jurors, and on their oaths do say they find the said defendant guilty as charged in the indictment.

And afterwards and on, to wit, the 29th day of November, A. D. 1892, the same being one of the regular juridical days of the November term, A. D. 1892, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

UNITED STATES OF AMERICA
vs.
JAMES CONNORS. } 824. Indictment for Interfering with Judges of Election.

20 Meals having been furnished to the jury in this cause while they were considering of their verdict, it is ordered by the court that the bill of Albert Nelson, amounting to fourteen dollars ($14.00), for said meals be approved, and the marshal is hereby directed to pay the same.

And thereupon and on the same day, to wit, the 29th day of November, A. D. 1892, the following further proceeding was had and entered of record in said court and in said cause, to wit:

UNITED STATES OF AMERICA
vs.
JAMES CONNORS. } 824. Indictment for Interfering with Judges of Election.

Meals and lodging having been furnished to the jury in this cause while they were considering of their verdict, it is ordered by the court that the bill of the Albany hotel, amounting to seventeen and $\frac{50}{100}$ dollars ($17.50), for said meals and lodging be approved, and the marshal is hereby directed to pay the same.

And afterwards and on, to wit, the 6th day of January, A. D. 1893, the same being one of the regular juridical days of the November term, A. D. 1892, of said court, present—the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

21 UNITED STATES OF AMERICA
vs.
JAMES CONNORS. } 824. Indictment for Interfering with Judges of Election.

At this day comes H. P. Rhodes, Esq., assistant district attorney, who prosecutes the pleas of the United States in this behalf, and the said defendant, in his own proper person and by W. B. Felker, Esq., his attorney, also comes.

And the motion for a new trial herein having heretofore come on to be heard and having been argued by counsel and by the court taken under advisement, and the court being now sufficiently advised in the premises, it is ordered by the court, for good and sufficient reasons to the court appearing, that the said motion be denied.

And the motion in arrest of judgment herein having heretofore come on to be heard and having been argued by counsel and by the court taken under advisement, and the court being now sufficiently advised in the premises, it seemeth to the court now here that the said indictment and proceedings herein are sufficient in law, and so the said motion is denied.

And thereupon day until thirty (30) days from this day is allowed the said defendant within which time to file a bill of the exceptions reserved by him upon the trial of the issues herein joined.

And, on motion of the district attorney, it is order- by the court that the said defendant be let to bail for his appearance to
22 submit to the judgment of the law herein, on Monday, the 6th day of February next, in the sum of twenty-five hundred dollars ($2,500.00).

And thereupon and on the same day, to wit, the 6th day of January, A. D. 1893, the following proceeding was had and entered of record in said court and in said cause, to wit:

UNITED STATES OF AMERICA
vs.
JAMES CONNORS. } 824. Indictment for Interfering with Judges of Election.

At this day comes James Connors, as principal, and Mart H. Watrous and Mary E. Connor, as sureties, and acknowledge themselves to owe and be indebted unto the United States of America in the penal sum of twenty-five hundred dollars ($2,500.00), to be levied of their and each of their goods and chattels, lands and te'ments, to the use of the said United States if default be made in the following condition, which condition is this: That if he, the said James Connors, shall personally be and appear at the district court of the United States for the district of Colorado, sitting at Denver, on Monday, the 6th day of February next, at the incoming of the court and from day to day thereafter and remain at and abide the order of said court and not depart the court without leave, then and there to submit to the judgment of the court upon the indictment against you for interfering with judges of election, then this recognizance to be void; otherwise to be and remain in full force and effect.

23 And afterwards and on, to wit, the 6th day of February, A. D. 1893, the same being one of the regular juridical days of the November term, A. D. 1892, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

UNITED STATES OF AMERICA
vs.
JAMES CONNORS. } 824. Indictment for Interfering with Judges of Election.

At this day comes J. D. Fleming, Esq., district attorney, who prosecutes the pleas of the United States in this behalf, and the said defendant, in his own proper person and by J. G. Taylor, Esq., his attorney, also comes.

And thereupon the said district attorney moves the court for judgment herein.

And thereupon it is enquired of the said prisoner if anything he hath to say why the judgment of the law should not now be pronounced against him, and thereupon he nothing saith except as he before hath said.

And it appearing to the court that there is within the district of Colorado no penitentiary or jail available for the confinement of convicts who may be imprisoned for a term exceeding one year; and it further appearing that the Attorney General of the United States has in due form of law designated and appointed the house of correction at Detroit, in the State of Michigan, as a fit and
24 proper place for the confinement of such convicts as may be committed by the judgment of any court within the district of Colorado for the term aforesaid:

Wherefore it is considered by the court that the said prisoner, James Connors, be by the marshal from hence removed to the common jail of Arapahoe county, from whence he came, and from there be by the marshal removed and conveyed, with all convenient speed, to the house of correction at Detroit, in the State of Michigan, and there delivered to the warden or keeper of the said house of correction, and be by him, the said warden, therein safely kept and confined at hard labor for the full period of fifteen months from this day, fully to be completed and ended; to be fed and clothed as the law directs.

It is further considered by the court that the United States do have and recover of and from the said defendant, James Connors, its costs by it in this proceeding laid out and expended, to be taxed, and have execution therefor.

And afterwards and on, to wit, the 7th day of February, A. D. 1893, the same being one of the regular juridical days of the November term, A. D. 1892, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said *and in said* cause, to wit:

25 UNITED STATES OF AMERICA *vs.* JAMES CONNORS. } 824. Indictment for Interfering with Judges of Election.

At this day it is ordered by the court that the order entererd in this cause on yesterday, the 6th instant, be set aside and vacated, and that the following stand in place thereof, to wit:

At this day comes J. D. Fleming, Esq., district attorney, who prosecutes the pleas of the United States in this behalf, and the said defendant, in his own proper person and by J. G. Taylor, Esq., his attorney, also comes.

And thereupon the said district attorney moves the court for judgment herein.

And thereupon it is inquired of the said prisoner if anything he hath to say why the judgment of the law should not now be pronounced against him, and thereupon he nothing saith except as he before hath said.

And it appearing to the court that there is within the district of Colorado no penitentiary or jail available for the confinement of convicts who may be imprisoned for a term exceeding one year; and it further appearing that the Attorney General of the United

States has in due form of law designated and appointed the house of correction at Detroit, in the State of Michigan, as a fit and proper place for the confinement of such convicts as may be committed by the judgment of any court within the district of Colorado
26 for the term aforesaid:

Wherefore it is considered by the court that the said prisoner, James Connors, be by the marshal from hence removed to the common jail of Arapahoe county, from whence he came, and from there be by the marshal removed and conveyed, with all convenient speed, to the house of correction at Detroit, in the State of Michigan, and there delivered to the warden or keeper of the said house of correction, and be by him, the said warden, therein safely kept and confined for the full period of fifteen months from this day, fully to be completed and ended; to be fed and clothed as the law directs.

It is further considered by the court that the United States do have and recover of and from the said defendant, James Connors, its costs by it in this proceeding laid out and expended, to be taxed, and have execution therefor.

And afterwards and on, to wit, the 8th day of February, A. D. 1893, came again the said defendant, by his attorneys aforesaid, and filed in said court and in said cause his bill of the exceptions reserved by him upon the trial of the issues herein joined.

And the said bill of exceptions is in words and figures as follows, to wit:

27 UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

In the District Court of the United States in and for the District of Colorado.

THE UNITED STATES, Plaintiff, }
vs.
JAMES CONNORS, Defendant. }

For the United States appeared J. D. Fleming, Esq.

For the defendant appeared John G. Taylor, Esq., W. B. Felker, Esq.

Be it remembered that on the trial of this cause, before the Honorable Moses Hallett, judge, at the Nov. term, A. D. 1892, of said court, to wit, on the 19th day of Nov., A. D. 1892, a jury having been duly selected, empaneled, and sworn to try the same, the United States, to maintain the issues herein on their behalf, gave evidence tending to prove the following facts—that is to say, and also upon the examination *of* the jurors who were empaneled and sworn to try such issues on their *voir dire* were asked certain questions by counsel for the defendant touching their competency as jurors, and among such questions the first juror so examined by counsel, James K. Stewart, was asked a question in these words or in words of similar import:

28 Q. To what political party do you belong and what were your party affiliations in Nov., A. D. 1890?

Whereupon the court stopped counsel and said that the question could not be propounded and the juror could not be called upon to answer such a question or any question of similar import touching the juror's political beliefs or attachments.

Counsel suggested to the court the propriety of such line of inquiry, if for nothing else, to enable counsel to exercise peremptory chal-anges for the defendant intelligibly, but the court excluded such questions and answers and declined to permit counsel for defendant to interrogate the said juror, Stewart, or any of the jurors upon that line of inquiry.

The matters here recited occurred in the morning hour of the court. The questions given below were presented after lunch time and while the examination of jurors was still in progress. The court did not then observe the character of the 4th question. If attention had been directed to that question it would have been allowed.

Counsel for defendant prepared and submitted in writing a number of questions they desired to ask the said juror and all the other jurors upon that subject; which questions are in the exact words and figures as follows:

Q. Did you take an active part in politics in the general election of A. D. 1890; and, if so, on which side?

29 Q. Did you take an active part in politics the last general election of A. D. 1892; and, if so, with which of the parties did you affiliate, and where?

Q. Have you been heretofore or are you now strongly partisan in your political beliefs?

Q. Would your political affiliations or party predilections tend to bias your judgment in this case either for or against this defendant?

Q. Were you ever at any time a member of what was and is known in the city of Denver, county of Arapahoe and State of Colorado, as the committee of one hundred?

Q. Were you ever at any time a judge or clerk of an election; and, if so, when and where, and by what party were you named and appointed?

Q. Are you a member of any political club organized for the advancement of the interests of any political party; and, if so, what party?

Which questions and each of them were by the court excluded, and counsel was refused the permission of asking the same; to which ruling of the court counsel for defendant then and there excepted.

And thereupon W. H. McDonald was called as a witness by the people, and in substance testified—

That he was at the polling-place of the Eighteenth precinct,

30 in the city of Denver, county of Arapahoe, and State of Colorado, on the 4th day of Nov., A. D. 1890, all during election

day; that a general election was being had, and he was there in the capacity of clerk of election; that he did not see the defendant Connors about the polling place during the day; that the polls closed at 7 o'clock; that the judges of election were Messrs. Adams, Pollard, and Patton and the other clerk was Mr. Fish; that after the polls closed supper was sent for, and when the same was put upon the table the defendant Connors came to the door just after the waiter brought in the supper; that one of the judges of election spoke to defendant and invited him to come in, and defendant did come in and stood at the corner of the table, and Pollard handed him a stool and he sat down. While engaged in eating, some standing and some sitting, he heard a noise something like the movement of feet or the movement of a chair, and Mr. Stone call out, There goes the ballot-box, and immediately all jumped up and most of them ran out to look for the ballot-box. The defendant remained in the room. The last that he noticed of the ballot-box before it was taken out was that it was back of his chair and he was sitting by the side of the defendant.

ORLA E. ADAMS was called as a witness by the people, and testified in substance as follows:

He was one of the judges of election in the November election in 1890, in the Eighteenth precinct, in Arapahoe county, in the city of Denver. A member of Congress was being voted for at that
31 election. Before we started to count the ballots supper was brought in, a few minutes after the closing of the polls. Directly after the waiter came in with the provisions the defendant appeared at the door. Mr. Pollard invited him in, gave him a chair, which the defendant took and sat down at the corner of the table. While they were eating he heard a shuffling noise near the partition, and some one said the ballot-box is gone. Immediately Mr. Stone went out of the door, and he followed him and both went across the street. He saw some one running on the opposite side of the alley. He made a search in the alley, but found nothing. They reported the loss of the ballot-box to the Democratic and Republican headquarters. He then went home. About 10.15 o'clock some one came to his house and said the ballot-box had been found and he was wanted. He went to the News office and there found the broken fragments of the ballot-box in charge of Mr. Maguire and Mr. Lee. They put them all together and took them to the voting place. The other judges came, and they went to the polling place and counted the ballots.

They found but few missing. He thinks four or five of the ballots were missing. Mr. Patton during the day had taken a number of the ballots and marked them, and so had he. They marked with different pencils, and in counting them he identified these that he had taken. After they had examined a portion of the ballots—he cannot remember just how many, probably one-third of the ballots—
they decided that those they had examined were either those
32 that he had taken or those that he had taken, and that it would not be necessary for us to go through with the balance of

them. He thinks that during the day 449 ballots had been cast. He had not observed the defendant about the polls during the day. There were three different tickets being voted for. The Democratic, Republican, and Prohibition. He thinks there were two Republican tickets. The judges of election were of different parties—two Republican judges, and he was with the democratic party; that this Eighteenth precinct was his voting precinct, and that he had voted there four or five years; that it was a Republican precinct and had been at former elections a Republican precinct. He further stated the ballot-box used that day was not locked.

THOMAS PATTON was also called as a witness by the people. He stated that he was a judge of election at the election held in the Eighteenth precinct in the city of Denver in A. D. 1890, and that he was acting as a Republican judge. He saw the defendant about the polls once during the day. After the polls closed the ballot-box was closed up and supper was brought in.

After the supper was brought in he heard a little noise near the ballot-box, and soon after Mr. Stone said that the ballot-box is stolen. He saw the defendant there at that time. He saw him come in and sit down at the table. He thinks one of the judges asked him to come in. He never showed any one any authority
33 to come in to his knowledge. After the ballot-box was stolen he went home. Some one called for him again that night, and he got out of bed and went to the News office, and there he saw the ballot-box knocked to pieces, a part of the ballots in a soap tub. When the other judges came they took the broken box to the polling place and commenced to count and counted about 450. There were four or five ballots missing. They were the same ballots that had been identified during the day. After the ballot-box was stolen and taken out of the polling place the defendant remained in the room. He was about next to the last man that went out.

JOHN F. STONE was called as a witness for the people, and in substance testified that he was a lieutenant of police; that two years ago he was deputy sheriff; was present at the polling place in the Eighteenth precinct upon the 4th of November, A. D. 1890, and detailed as deputy sheriff there during the day; was outside the polling place during the day; is acquainted with defendant; saw defendant about the polling place only twice during the day of election—once in the forenoon and once along in the evening, about half an hour before the polls closed. After the polls closed he went into the polling place. They were just bringing in the last of the supper when he heard a noise or a sound; leant over and saw the top of a man's head or the side of a man's face rise up behind defendant, and there was a quick movement, but he did not
34 know what the trouble was, but gave chase to see. Defendant was sitting at a corner of the table. He searched for the ballot-box across the street and in the alley, but could not find it. In giving chase to the man who ran out with the ballot-box he recognized the ballot-box in the man's hand. The man was run-

ning. He went back to the polling place and saw the defendant. He went into the polling place that night as a Democratic watcher.

H. L. PALMER was called as a witness by the people, and in substance testified as follows:

That he was a police officer and was acting in that capacity in the month of November, A. D. 1890; that he was present at the polling place of the Eighteenth precinct the night after the election of that year; was at said polling booth all day; was acquainted with defendant; saw defendant at the polling place twice during the day, once in the forenoon and once in the afternoon. After the polling place was closed was sent there from the police department to stay until the ballots were counted; saw the defendant there that night; first saw him standing at the door, and Mr. Pollard asked him in and defendant sat down at the table; some one then gave the alarm that the ballot-box was gone; do not know who it was; he followed Mr. Stone and Mr. Adama out of the door and made search for the ballot-box, but did not find it.

35 SAM. EMERICK was called as a witness by the people, and testified in substance that he was about the polling place in the Eighteenth precinct, in the city of Denver, on the 4th day of November, A. D. 1890, and is acquainted with the defendant; saw defendant about the polling place twice during that day—once in the morning about 8 or 9 o'clock and once in the afternoon about 3 or 4 o'clock—and remained about half an hour each time.

GEORGE M. HOPKINS was called as a witness by the people, but practically gave no testimony, the same being excluded by the court.

A. B. MCKINLEY was called by the people, — in substance testified as follows:

He was a candidate for the office of State senator from the sixth senatorial district of the State on the Democratic ticket at the election held on the 4th day of November, A. D. 1890. At that election there was a member of Congress being voted for. After the polls closed on election night, on the 4th of November, A. D. 1890, he was at the Markham hotel, Democratic headquarters, when informed that the ballot-box of the Eighteenth precinct had been stolen. He started out from said headquarters and met the judges of election, and they confirmed the story. He then went to county headquarters and met William R. Perry, when it was proposed to go in search of the ballot-box in the alley
36 between Arapahoe and Lawrence streets. While searching he saw near Eighteenth street, in the alley, a large man and started to walk towards him. There was some conversation as to who the man might be, and when he had gotten almost to him he discovered, and so did Mr. Perry about the same time, that it was defendant. He exclaimed to that effect and so did Perry, and both started to overtake defendant, when Perry remarked that he would go ahead; that he was better acquainted

saw two men bending over the broken box, but did not speak to them. He then went to county headquarters and inquired for McKinley and left a note for him. He then went to the Greystone club, a Democratic organization, and waited for Mr. McKinley. He then spoke — a man by the name of William Ferguson, and told him what had occurred without giving any names. From there he went to Markham hotel, which was Democratic headquarters, but said nothing about the occurrence. He then went to the Greystone club and said nothing of the occurrence. He went to the News office and said nothing about the occurrence, because he wanted to see McKinley first. He also found there the parties who had discovered the ballots guarding them, but said nothing of his knowledge of the affair. He was and is a Democrat, and had been detailed during that day to watch over the election and polling in the Eighteenth precinct.

JAMES L. COULTER was called as a witness by the people, and testified that on the 4th of November, A. D. 1890, his place of business was at #1801 Arapahoe street, in the city of Denver;
41 was in the saloon business right on the corner; knows defendant, and also knows William Perry. He did not see them on that night to identify them, but saw two men pass his place of business that night, and was standing inside of the saloon and heard a noise outside and looked towards Nineteenth street and saw a lot of papers on the sidewalk. He went out and walked up to where they were and picked them up and saw they were ballots. Another party was with him and said, These are the ballots that were stolen over here from Lawrence street. He had heard the noise of the breaking glass when the box fell. It was between 10 and 11 o'clock at night; it was dark and drizzly. He watched the ballots while Mr. Vanderweiden went to the News office and until he came from the News office. They saw parties who picked up the broken glass and ballots and carried them away.

NICHOLAS CONSTANIO was called as a witness by the people, and in substance testified that his place of business on the night of the 4th of November, A. D. 1890, was on Arapahoe street; that on that night a glass box was dropped in front of his place; he was standing in his door and saw two men, one tall and the other a little fellow, pass by; one had a big coat on, half on, over his shoulder and dropped something on the sidewalk; does not know whether it was a ballot-box or what, but took his broom and swept everything—papers and glass—into the street; after five or ten minutes two or three men came with a basket and picked up the broken
42 glass, papers, and everything, and went away; he further testified that these two men, the tall and the short one, were walking together, and another man, making the third man, was walking right behind them four or five feet from them and all three walked on towards Nineteenth street, and after awhile there came other men walking that way.

WILLIAM MAGUIRE was called as a witness by the people, and testified as follows: That he was one of the persons who went from the News office up to the place on Arapahoe street where the ballot-box had been dropped and gathered up the ballots and the broken box and carried them back to the News office.

PATRICK GALLAGHER was called by the people as a witness, and testified that on the night of the election on the 4th of November, A. D. 1890, he saw a man run out of a place on Lawrence street, and in two or three seconds another man ran after him and they got to the middle of the street; he saw him put his hand in his hip pocket and pull out his handkerchief, and he run up an alleyway behind the power-house; he then went into the place where the man run out of, and some person told him that the ballot-box had been taken.

And this was all the testimony offered in behalf of the people.

WILLIAM PRINN was called and sworn as a witness for the
43 defendant, and testified as follows:

That he is the deputy clerk and recorder of Arapahoe county, Colorado, and by virtue of that office has the legal authority and control of the returns of the judges of election and the canvass of the votes of the county of Arapahoe by the canvassing board. He was asked to produce the official record of the canvass of the votes of the Eighteenth precinct of Arapahoe county for the year 1890 and the two elections previous thereto, which book he then and there had in hand. Defendant's counsel offered in evidence that portion of the records containing the canvass of the votes for 1890 of the Eighteenth precinct of the county of Arapahoe, and also the official canvass of the votes for the three preceding elections of that same precinct, but it was objected to by counsel for people; which objection was by the court sustained; to which ruling of the court the defendant, by his counsel, then and there excepted.

Defendant's counsel then said: We wish to show by the official count of the vote of the Eighteenth precinct in the city of Denver for the election of 1890 that the Democratic ticket received a much larger vote than ever before in this particular precinct, and that this precinct had been largely Republican in the previous elections.

The COURT: It will be excluded.

To which ruling of the court the defendant, by *its* counsel, then and there excepted.

44 The following question was then put to the witness by defendant's counsel:

Q. Have you figured up from the returns as canvassed by the board of canvassers of the year A. D. 1890 as shown upon that book the result of the legislative ticket by counting the votes as returned from the Eighteenth precinct, Fourth ward, of the county of Arapahoe; and, if so, what effect did it have in seating any Democratic member on the legislative ticket?

Counsel for the people object; which objection was by the court sustained, and counsel for the defendant excepted.

JUDSON N. POLLARD was called as a witness by the defendant, and stated that he was one of the judges of election for the Eighteenth precinct in the general election held on the 4th of November, A. D. 1890, and as to the question of the defendant's appearing at the polling place after the polls were closed and entering the room and taking a seat at the table, and then the removal of the ballot-box, while supper was being eaten, by some unknown person, was substantially the same as the testimony given by the witnesses Patton, Adams, and MacDonald.

Mr. SCHERMERHORN was called as a witness on the part of the defendant, and his testimony tended to corroborate the evidence given by the witnesses Pollard, Patton, Adams, and MacDonald
45 concerning the appearance of the defendant at the polling place after the polls were closed and the manner of the removal of the ballot-box.

A. B. PLACE was call- and sworn as a witness in behalf of the defendant, and in substance testified that he resides in the Highlands; that in the fall of 1890 he was city treasurer of the city of Denver, Colo.; that on the night of the general election, on the 4th of November, A. D. 1890, after supper, he came down to defendant's saloon, on Lawrence street; that he got there shortly after 8 o'clock and remained there and did not leave until about 11 o'clock that night; that he was there continuously during that time, and during all that time the defendant was in the saloon, but possibly may have gone out for 5 minutes. He fixes these hours by reason or fact that he was interested in knowing how the election was going, and came down to defendant's place because he knew defendant was informed about the election matters in the Fourth ward. Witness had several drinks that evening of both whiskey & beer.

PHIL. KELLER was called and sworn as a witness for defendant, and in substance testified that he resides on California street, in the city of Denver; that he has been on the police force and also been in the sheriff's office of Arapahoe county; was deputy sheriff under Albert H. Webber; that on the night of the general election of 1890, after the polls closed, he was over at defendant's saloon; that he got there very close to eight o'clock. He fixes the hour by
46 reason of the fact that he was committeeman at the Twenty-first precinct and stayed there until they commenced counting the ballots and then walked right over from there to defendant's saloon; that he stayed there from that hour continuously until about a quarter of twelve o'clock; that defendant was in the saloon during all of that time, with one exception, and that was, there were a lot of men in there talking to the defendant and myself about the ballot-box being stolen, and the party went out the back way to the alley, to get to the City alley, looking for the ballot-box; that defendant himself and Anderson went through the alley out 18th

street, walked around the power-house and back into defendant's saloon; that was the only time the defendant was out of the saloon during the evening; that took place about ten minutes after eight o'clock. Defendant saw Mr. Place there; that they took this excursion through the alley before Mr. Place came to the saloon; he and defendant left the saloon together and walked up to his house, and then defendant left him there and went on home. Witness testified on cross-examination that he was drinking some that night, and that he was barkeeper for defendant at the time.

JAMES CONNORS was called, and testified in his own behalf as follows:

On the 4th of November, 1890, the day the general election was had I was in the city of Denver. I was about the polling
47 place in the Eighteenth precinct during the forenoon 10 or 15 minutes and in the afternoon about the same length of time. I took no interest and did no work about the election that year; had no difficulty with any one in regard to election matters that day. Some fifteen or twenty minutes after the polls closed he went to the barn in which the polling place was. Somebody invited him in and he walked in and stood by the corner of the table, and afterwards sat down on a broken chair, which was handed him by some one. The three judges of election and the two clerks, Police Officer Palmer, and Deputy Sheriff Stone were in the room. He had been in there some ten or fifteen minutes, and while sitting at the corner of the table heard some one remark that the ballot-box was gone, and Mr. Stone ran out of the door and nearly every one else ran out also, except Mr. Patton, Mr. Fish, and Mr. MacDonald, as he recollects. He said to them that they had better take care of the books and not lose them also. He and Mr. Patton then walked out together; he going to the saloon, which was across the street. This was about a quarter of eight. He stayed in his saloon until about a quarter after eight, when Mr. Keller and four or five others who were in the room together with himself walked out into the alley. Keller, another man, and himself walked down through the alley and the others went the other way. He and the others went out down the alley on Eighteenth street and up Eighteenth street to Lawrence, then up Lawrence street to his saloon, at which
48 place he stayed until he left for home, about a quarter of twelve o'clock that evening. During the entire evening he was there is his saloon in company with Mr. Place, Mr. Keller, and Mr. Schermerhorn. He never saw Mr. Perry but one time during that evening, and that was before he went over to the voting place. Perry was in the saloon. He never knew where the ballot-box was nor who had taken it. He never saw the ballot-box that evening. He had no interest for any friend or for himself in the result of the election. He was at that time and is now a Republican. In all elections previous to the one in November, A. D. 1890, he had taken an interest and had worked for the Republican party. He knew that in all previous elections this Eighteenth precinct had been very

strongly Republican. Sometimes it had gone as high as four or five hundred majority in that precinct.

Thereupon the defendant rested his case and the people called in rebuttal JOHN STONE, who denied introducing Schermerhorn to a young man about the polling place the evening of the election in question.

This was all the testimony offered in the case, and thereupon the court instructed the jury as follows:

"This indictment charges that the defendant, on the 4th day of November, 1890, did interfere with the judges of election in the Eighteenth voting precinct, in the county of Arapahoe, in the discharge of their duties; that the said judges were then and there officers of the election for Representative in the 52nd Congress of the United States in accordance with the laws of the State of
49 Colorado and of the United States, and that he did then unlawfully and with force and arms seize, carry away, and secrete the ballot-box containing the ballots of said Eighteenth voting precinct which on said 4th day of November, in the year aforesaid, at the said election had been cast for said Representative in Congress, and then and there knowingly aid and assist in the forcible and unlawful seizure, carrying away, and secreting of said ballot-box, and did then and there counsel, advise, and procure divers other persons, whose names are to the grand jurors unknown, so to seize, carry way, and secrete said ballot-box, thereby, as aforesaid, interfering with the said judges of election of said Eighteenth precinct and hindering and preventing them, the said judges of election, from counting the votes which had been cast at said election and declaring and certifying the result thereof.

As the evidence is presented to you it is not contended that the defendant took this ballot-box in person, but that it was done by some other person by his aid and assistance or with his advice and procurement. The evidence upon which the Government relies in that respect is that the defendant appeared at this precinct shortly after the closing of the polls at this election and seated himself at a table there, and soon afterwards the box was taken by some person unknown, who carried it off.

As I understand the position of counsel for the Government, he wishes you to infer from the circumstance of the defendant's being there at this time that he was there for the purpose of assisting in or of covering the act of taking. The box being found, as it is alleged, in his possession some two hours or more after that time, it must be assumed from this circumstance that he was cognizant of the manner in which and of the person by whom it was taken, and certainly if the box was found in his possession, as stated by the witness Perry, it would seem to be an almost irresistible inference that he knew the person who had taken it and was then endeavoring to conceal it.

The defendant himself denies on the stand that he knew anything of the circumstances, and denies that he at any time had the

box; denies, if I understand him correctly, that he saw Mr.
50 Perry during that evening or was with him at any time.

So that, as contended before you by counsel, it is very much a question whether the truth is spoken by the witnesses for the Government or by the defendant himself. It must appear to you, in order to establish the charge, from all the circumstances which are disclosed in evidence that the defendant was cognizant of the taking, knew who took it, and it was done by his procurement and aid. If the box was taken by some persons to him unknown and afterwards came to his possession without any agency on his part in the taking of it, he probably cannot be charged under this act; but, since he denies that he knew anything of the taking and denies that he at any time had the box in his possession, if he was seen by any one in possession of it during that evening, it seems to put the matter in the attitude of a question of fact as to whether he did in fact have the box in the course of the evening. Under the circumstances of his denial and the proof on the other side it would seem to be a reasonable and fair inference that if he had the box in his possession he must have been cognizant of the taking of it—he must have aided and assisted in taking it.

That is the question as it stands before you, gentlemen, what you will decide the fact to be upon the testimony as it is presented before you.

Counsel for defendant challenges the truth of the statements of the Government's witnesses boldly, and declare its inherent improbability from all the circumstances disclosed in the transactions of that evening and the circumstance that some witnesses testify defendant was in his saloon and not out during the evening, that this testimony is not to be accepted by you.

You must believe, however, that the box got to the place in which it was broken and where it was undoubtedly found by the witness Maguire and others, that the defendant had no agency in taking it or carrying it there.

This is an offence which is punishable by fine and imprisonment under section 5511 of the Revised Statutes of the United States, and is therefore a serious one, so that you must deliberate
51 on it with care and return your verdict as the truth of the matter appears to you to be.

I have to say to you that in this, as in all cases of a criminal nature, the facts must be plainly made out; you must believe them to be fully proved, or, as it is usually expressed, there must be no reasonable doubt in your minds upon the evidence as to the truth of the fact."

And the jury, after retiring to their jury-room, returned into open court and delivered their verdict, finding the defendant guilty as charged in the indictment.

Whereupon the defendant, by his counsel, on the — day of November, A. D. 1892, filed a motion for a new trial and a motion in arrest of judgment, supported by certain affidavits; which two motions and affidavits are in words and figures as follows:

UNITED STATES OF AMERICA, }
District of Colorado. }

In the District Court of the U. S. for the District of Colorado.

THE UNITED STATES OF AMERICA, Plaintiff, }
vs. }
JAMES CONNORS, Defendant. }

And now comes the defendant, James Connors, by his attorneys, W. B. Felker and John G. Taylor, and moves this honorable court to set aside the verdict heretofore rendered by the jurors impaneled to try this cause and to grant to the defendant a new trial herein upon the grounds and for the reasons as follows, to wit:

52 I. The verdict rendered by the jury herein was contrary to the law and evidence.

II. There was no evidence whatsoever offered by the Government in the trial of the cause which tended to show that the defendant ever in person took the ballot-box from legal custodians or ever aided or counseled any one else to do so.

III. The court erred in refusing to allow counsel for defendant to propound to the jurors on their *voir dire* certain questions or any questions touching either their political and party affiliations or the prejudices arising from such political or party affiliations; and, in that connection, the court erred in refusing to allow counsel for defendant to propound each and all of the following questions, which counsel for defendant asked of the court permission to propound to the jurors on their *voir dire:*

Q. Did you take a part in the general election of 1890; and, if so, on which side?

Q. Did you take a part in the last general election of 1892; and, if so, with which of the parties did you affiliate in the work?

Q. Have you been heretofore or are you now a strong partisan in your political belief?

Q. Would your political affiliations or party predilections tend to bias your judgment in this cause either for or against this defendant?

Q. Were you ever at any time a member of what was and is known in the city of Denver, county of Arapahoe and State of Colorado, as the "committee of one hundred?"

Q. Were you ever at any time a judge or clerk of an election; and, if so, when and where and by what party were you named and appointed?

Q. Are you a member of any political club organized for the advancement of any political party; and, if so, what party?

IV. The court erred in forcing the defendant to trial in this cause without giving him the legal means of ascertaining whether or not the jurors to sit in trial in the cause entertained any bias or prejudice for or against him by reason of their political opinions and party affiliations.

53 V. The court erred in excluding over the objections of defendant proper and material testimony at the time of the trial.

VI. The court erred in excluding from the jury testimony offered by the defendant through the witness Prinn, showing the official result and count of the ballots taken in the Eighteenth precinct and from the ballot-box which it was charged in the indictment herein the defendant had interfered with.

VII. The court erred in refusing testimony offered by defendant through the witness Prinn, showing the official count and canvass of the vote of the said Eighteenth precinct at the former and preceding elections and showing that by such official count said precinct had returned large Republican majorities.

VIII. The court erred in refusing to allow the defendant, through the witness Prinn, to show by the official count and canvass of the vote made in said precinct and from the said ballot-box in question of the general election of 1890 that a large Democratic majority was so counted in said precinct.

IX. The court erred in the instructions to the jury.

X. The court erred in instructing the jury that in the event they believed the defendant was in possession of the ballot-box, as stated by the witness Perry, that the inference was almost irresistable that the defendant did participate in the removal of the ballot-box from the polling place.

(The IX & X grounds above written were added to the motion with the permission of the court and the district attorney.)

(Signed) JOHN D. FLEMING, *U. S. Att'y.*

UNITED STATES OF AMERICA, }
District of Colorado. }

In the District Court of the U. S. for the District of Colorado.

THE UNITED STATES OF AMERICA, Plaintiff, }
vs.
JAMES CONNORS, Defendant. }

54 James Connors, being first duly sworn, on his oath deposes and says that he is the defendant in the above-entitled cause; that at the time the jurors were impaneled in this cause and rendered the verdict herein he was not personally acquainted with either one of said jurors, and had no knowledge whatsoever of the politics or party affiliations of either of them, and had no knowledge of whether such jurors or either of them were, by reason of any political attachments, prejudiced for or against him in the case, and from such lack of knowledge he was unable to advise or give information to his counsel acting for him at the trial in their exercise of his peremptory challenges, and that he had no means of acquiring knowledge of the political prejudices and bias of said jurors previous to their being impaneled and sworn in this cause.

(Signed) JAMES CONNORS.

UNITED STATES OF AMERICA,
District of Colorado.

In the District Court of the U. S. for the District of Colorado.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
JAMES CONNORS, Defendant.

W. B. Felker and John G. Taylor, being both duly sworn, each for himself and not one for the other on their oaths do say that they and each of them are and were at the time of the trial acting as the sole counsel for the defendant, James Connors; that at the time the jurors were impaneled and sworn to try the issues in this cause, were brought into the jury-box for examination upon their *voir dire*, they were not acquainted with such jurors or either of them, and deponents nor neither of them had any knowledge or information and had no means of obtaining any information of the political and party affiliations of said jurors or either of them and whether or not said jurors had any prejudice or bias for or against the defendant by reason of their political attachments, and by reason of the lack of information in that particular no per-
55 emptory challenge could be or was exercised for the defendant upon that ground.

(Signed) JOHN G. TAYLOR.
(Signed) W. B. FELKER.

UNITED STATES OF AMERICA,
District of Colorado.

In the District Court of the U. S. for the District of Colorado.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
JAMES CONNORS, Defendant.

And now comes the defendant, by his attorneys, W. B. Felker and John G. Taylor, and moves this honorable court to arrest the judgment on the verdict heretofore rendered by the jurors in this cause upon the ground and for the following reasons, to wit:

First. It is not shown by the indictment herein whether the Government would rely upon the charge herein set forth that the defendant was guilty as principal or as accessory before or after the fact.

Second. That the indictment herein charges in the same clause and in the same count that the defendant did the acts complained of both as principal and as accessory before and after the fact, and that such indictment herein is insufficient in law to support a conviction and sentence upon the verdict.

(Signed) JOHN G. TAYLOR.
(Signed) W. B. FELKER.

Which motion for a new trial and a motion in arrest of judgment were each of them by the court overruled.

To which ruling of the court the defendant, by his counsel, then and there duly excepted.

56 And now, forasmuch as the matters above set forth did not fully — of record, the defendant tenders this his "bill of exceptions" by him reserved herein, and prays that the same may be signed and sealed by the judge of this court and made a part of the record in this action pursuant to the statute in such cases made and provided, which is accordingly done on this 8th day of February, in the year of our Lord eighteen hundred and ninety-three.

MOSES HALLETT,
Dist. Judge.

(Indorsed:) 824. District court U. S. United States of America *vs.* James Connors. Bill of exceptions. Filed Feb'y 8, 1893. Francis W. Tupper, clerk, by Charles W. Bishop, deputy clerk. John G. Taylor, attorney, Denver, Colorado.

UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

I, Francis W. Tupper, clerk of the district court of the United States for the district of Colorado, do hereby certify the above and foregoing to be a true, perfect, and complete transcript and copy of the record and proceedings and of all thereof heretofore filed or had and entered of record in said court and in a certain cause lately in said court pending between the United States of America and James Connors as fully and completely as the same still
57 remain on file or of record in my office, at Denver.

Seal United States District Court, District of Colorado.

In testimony to the above I do hereunto sign my name and affix the seal of said court, at Denver, in said district, this ninth day of February, A. D. 1893.

FRANCIS W. TUPPER, *Clerk,*
By CHARLES W. BISHOP,
Deputy Clerk.

Endorsed on cover: Case No. 15,276. Colorado D. C. U. S. Term No., 512. James Connors, plaintiff in error, *vs.* The United States. Filed March 13, 1893.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

JAMES CONNORS, Plaintiff in Error,
vs.
THE UNITED STATES, Defendant in Error. } No. 512.

And now comes the plaintiff in error herein, by his attorney, E. T. Wells, and, making showing thereto, says that in the record, proceedings, and judgment entered in this cause there is manifest error and injury to the plaintiff in this, to wit:

First. The court erred in overruling the motion to quash the indictment herein, which ruling was duly excepted to, and for refusing to arrest the judgment on the verdict rendered by the jurors in this cause upon the plaintiff's motion in that behalf, wherein it was pointed out and solemnly argued in open court that the said indictment was insufficient to sustain a conviction, it charging plaintiff in error in one count of being guilty as a principal and as accessory before and after the fact of the matters and things charged in the indictment, there being nothing in the verdict or in the proceedings to determine in which capacity he was found guilty; to all of which exception was duly *p*reserved.

Second. The court erred in refusing to permit counsel for plaintiff in error to interrogate the jurors on their *voir dire* concerning their political convictions and prejudices, if any, in the cause; the first of which questions was:

"Q. To what political party do you belong and what were your party affiliations in November, 1890?" At this question the court stopped counsel of its own motion and said that the question could not be propounded and the juror- could not be called upon to answer such question or any question of similar import touching the jurors' political beliefs or attachments. Counsel then prepared and submitted in writing a number of questions they desired to ask the said jurors; which questions are in exact words and figures as follows:

"Q. Did you take an active part in politics in the general election of A. D. 1890; and, if so, on which side?

Q. Did you take an active part in politics the last general election of A. D. 1890; and, if so, with which of the parties did you affiliate and where?

Q. Have you been heretofore or are you now strongly partisan in your political beliefs?

Q. Would your political affiliations or party predilections tend to bias your judgment in this case either for or against this defendant?

Q. Were you ever at any time a member of what was and is known in the city of Denver, county of Arapahoe, and State of Colorado, as the committe of one hundred?

Q. Were you ever at any time a judge or clerk of an election; and, if so, when and where and by what party were you named and appointed?

Q. Are you a member of any political club organized for the advancement of the interests of any political party; and, if so, what party?"

Third. The court erred in refusing to permit counsel for plaintiff in error to interrogate on cross-examination the witness McKinley touching the effect of the vote in the 18th precinct, that being the voting place where it was alleged in the indictment the wrong was committed, and, further, in refusing to permit counsel for plaintiff in error to introduce certain testimony tending to show the effect of the vote in said precinct. The particular examination sought to be made of the said McKinley was as follows:

"Q. Are you able to state what would have been the effect upon your own vote and the vote of Mr. Bromley if that precinct had been thrown out?

Q. Who was the candidate immediately opposed to you in that election? A. Judge Steck was then generally regarded as such, but Judge Steck was then running closer.

Q. Judge Steck was elected? A. Yes, sir, and I was elected.

Q. You and your opponent were not both elected? A. Yes, sir; there were two elected. I was elected on the Democratic ticket and Judge Steck on the Republican ticket.

Q. Who were the defeated candidates? A. James A. Black on our ticket and Henry Suess on the other.

Q. Was there any contest made about the result or about the counting of the vote in that precinct? A. Not over my election. I would have been elected, anyway.

Q I did not ask you that. I merely want to know if there was such a contest. A. There was a contest. My answer was interrupted. I can answer that. There was a contest by Mr. Bromley's side in the legislature, and I know that the evidence about these ballots was given on that. Whether or not the contest was solely based on that I do not know. It was in the lower house and I did not have any part in it. I know that they took evidence upon this Eighteenth precinct affair in that case and they had attorneys.

Q. And the integrity and security of Mr. Bromley's seat in the the legislature depended on the count in this precinct, didn't it?"

This was objected to and the objection sustained.

That part of this assignment of error wherein it is claimed that the court erred in excluding the testimony offered by plaintiff in error pertains to the examination of the witness offerred by plaintiff in error named William Prinn. It was shown that this witness was the deputy clerk and recorder of Arapahoe county, Colorado, and that by virtue of his office he was in control of the returns of the judges of the election and canvass of the votes of the county of Arapahoe by the canvassing board. He produced in court the official record of the canvass of the votes of the Eighteenth precinct of Arapahoe county for the year 1890 and the two elections previous thereto. Counsel then offered in evidence that part of the record

containing the canvass of the vote for 1890 in said Eighteenth precinct as well as the official vote for three preceding elections in the said precinct.

But this was objected to and the objection sustained.

Counsel then said to the court:

"We wish to show by the official count of the vote of the Eighteenth precinct in the city of Denver for the election of 1890 that the Democratic ticket received a much larger vote than ever before in this particular precinct, and that this precinct had been largely Republican in the previous elections."

The court said:

"It will be excluded."

Counsel then put this question to the witness:

"Q. Have you figured up from the returns as canvassed by the board of canvassers of the year A. D. 1890, as shown upon that book, the result of the legislative ticket by counting the votes as returned from the Eighteenth precinct, Fourth ward, of the county of Arapahoe; and, if so, what effect did it have in seating any Democratic member on the legislative ticket?"

But this was objected to and the objection was sustained.

Fourth. The court erred in giving instructions concerning the law to the jury in those certain parts specifically expressed as follows:

"As the evidence is presented to you it is not contended that the defendent took this ballott-box in person, but that it was done by some other person by his aid and assistance or with his advice and procurement. The evidence upon which the Government relies in that respect is that the defendant appeared at this precinct shortly after the closing of the polls at this election and seated himself at a table there, and soon afterwards the box was taken by some person unknown, who carried it off.

As I understand the position of counsel for the Government, he wishes you to infer from the circumstance of the defendant's being there at this time that he was there for the purpose of assisting in or of covering the act of taking. The box being found, as it is alleged, in his possession some two hours or more after that time, it must be assumed from this circumstance that he was cognizant of the manner in which and of the person by whom it was taken, and certainly if the box was found in his possession, as stated by the witness Perry, it would seem to be an almost irresistable inference that he knew the person who had taken it and was then endeavoring to conceal it.

The defendant himself denies on the stand that he knew anything of the circumstances and denies that he at any time had the box; denies, if I understand him correctly, that he saw Mr. Perry during that evening or was with him at any time.

So that, as contended before you by counsel, it is very much a question whether the truth is spoken by the witnesses for the Government or by the defendant himself. It must appear to you, in order to establish the charge from all the circumstances which are disclosed in evidence, that the defendant was cognizant of the taking,

knew who took it, and it was done by his procurement and aid. If the box was taken by some person to him unknown and afterwards came to his possession without any agency on his part in the taking of it, *he* probably cannot be charged under this act; but, since he denies that he knew anything of the taking and denies that he at any time had the box in his possession, if he was seen by any one in possession of it during that evening, it seems to put the matter in the attitude of a question of fact as to whether he did in fact have the box in the course of the evening. Under the circumstances of his denial and the proof on the other side, it would seem to be a reasonable and fair inference that if he had the box in his possession he must have been cognizant of the taking of it—he must have aided and assisted in taking it."

By reason whereof the said plaintiff in error prays that said judgment may be reversed and he in all things restored to his former estate, freed from the injury and wrong herein done to him.

E. T. WELLS,
Att'y for Plaintiff in Error.

[Endorsed:] Case No. 15,276. Supreme Court U. S., October term, 1894. Term No., 512. James Connors, pl'ff in error, *vs.* The United States. Assignment of errors. Filed Nov. 6, 1894.

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CLERK.

IN THE

SUPREME COURT

—OF THE—

UNITED STATES

JAMES CONNORS,
Plaintiff in Error,

vs.

THE UNITED STATES,
Defendant in Error.

512

STATEMENT.

E. T. WELLS,
for Plaintiff in Error.

COLLINS PRINT. 1418 & 1420 LARIMER.

IN THE

SUPREME COURT

—OF THE—

UNITED STATES

JAMES CONNORS,
Plaintiff in Error,

vs.

THE UNITED STATES,
Defendant in Error.

STATEMENT.

This case was brought up on a writ of error from the District of Colorado.

In the United States District Court, on or about the 29th day of July, 1891, an indictment was preferred against the plaintiff in error, presenting certain charges against him for a violation of

certain provisions of the statutes concerning elections.

This indictment is brought under section 5511 of the Revised Statutes of the United States, which is, in substance, a provision to prevent any one from interfering in the elections of federal officers. After reciting a great many acts which are prohibited, the section says, "or interfering in any manner with any officer of such election in the discharge of his duties," etc.

It will be seen that this indictment and all the proof in the case necessarily brings it upon that line in this section of the law.

The indictment charged plaintiff in error with, on the 4th day of November, 1890, in the County of Arapahoe, unlawfully interfering with the judges of election of the eighteenth voting precinct in said county. The charge of the indictment is as follows:

"That heretofore and on, to-wit, the 4th day of November, in the year of our Lord one thousand eight hundred and ninety, at the County of Arapahoe, State of Colorado, and within said district, one James Connors did unlawfully interfere with the judges of election of the eighteenth precinct in said County of Arapahoe in the discharge of their duties, which said judges of election were then and there officers of the election for representive in the Fifty-second Congress of the United States, in accordance with the laws of the State of Colorado and of the United States, and did unlawfully and with

force of arms, seize, carry away and secrete the ballots of said eighteenth voting precinct, which on said 4th day of November, in the year of our Lord aforesaid, at said election, had been cast for said representative in Congress, and did then and there knowingly aid and assist in the forcible and unlawful seizure, carrying away and secreting of said ballot box, and did then and there counsel, advise and procure divers other persons, whose names are to the grand jurors unknown, so to seize, carry away and secrete said box, thereby, as aforesaid, interfering with said judges of election of said eighteenth voting precinct, and hindering and preventing them, the said judges of election, from counting the votes which had been cast at said election and their declaring and certifying the result thereof."

Record, page 6.

The case came on for trial before a jury, his Honor, Judge Hallett, presiding, on the 19th day of November, 1892. A jury was empanneled, and counsel for Connors attempted to examine them on their *voir dire*, and propounded this question to one of the jurors: "To what political party do you belong, and what were your party affiliations in November, 1892?" Record, page 14. Whereupon the Court, of its own motion, stopped counsel and prohibited him from propounding that question, or any similar questions, to the jury. Then the following questions were written out by counsel for Connors

and submitted to the Court as questions which it was desired by counsel to propound to the jury, and to each of them. The Court refused to allow counsel to ask any of the questions, or any similar questions. These questions, so written out and handed to the Court, are as follows:

"Q Did you take an active part in politics in the general election of A. D. 1890; and, if so, on which side?

"Q Did you take an active part in politics the last general election of A. D. 1892; and, if so, with which of the parties did you affiliate, and where?

"Q Have you been heretofore, or are you now, strongly partisan in your political beliefs?

"Q Would your political affiliations or party predilections tend to bias your judgment in this case, either for or against this defendant?

"Q Were you ever at any time a member of what was, and is, known in the city of Denver, County of Arapahoe, and State of Colorado, as the Committee of One Hundred?

"Q Were you ever at any time a judge or clerk of election, and, if so, when and where, and by what party were you named and appointed?

"Q Are you a member of any political club, organized for the advancement of the interests of any political party, and if so, what party?"

Record, page 14.

After the jury was empanneled, the govern-

ment introduced its witnesses, who all testified that the plaintiff in error was in the room where the judges of election were, and after the election was over some one took the ballot box away; that is, the testimony is without conflict, that Connors was sitting in the judges' room when the person who did carry the ballot box away was seen with it, and he remained in the room among the last that went out. He was seen neither to do nor to counsel the doing of anything in connection with the removal of the ballot box.

Record, pages 15, 16.

The testimony connecting plaintiff in error with the case at all was, that several hours after the removal of the ballot box he was seen with it under his arm at a place some distance from the voting place. Record, pages 19, 20.

The testimony offered by the defense consisted of that of Connors himself and a number of acquaintances, several of whom swore that they were with him all evening, and that he was not at the place where it was claimed he had the ballot box, he himself denying the truth of that statement.

Connors' counsel then offered to the Court certain testimony going to prove—first, that Connors was a Republican, and had affiliated with the Republican party for many years, and had been an active partisan in this very precinct from which the ballot box was taken; again, that this precinct had always been a Republican stronghold, casting a majority of something like 300 to 500 for the Re-

publican ticket at the last three or four preceding elections. And further, that the ballots in this particular ballot box that Connors is charged with taking, when counted, showed a complete change in the voting of the precinct, and that it was necessary to count these very ballots to elect one or more Democrats, and when the ballots were obtained and counted, it led to the election of one or more Democrats; and further, that all those interested in hunting this ballot box and procuring the ballots were Democrats. The Court refused to let Connors' counsel pursue this line of testimony, and the jury found him guilty, as charged in the indictment, and the Court sentenced him to fifteen (15) months in prison.

The assignments of error in this case are full and exhaustive, and cover the matters complained of in the record by the plaintiff in error. We, in discussing these matters, will attempt to take up these assignments in the order they are made, and group them under their respective heads.

It will be seen that the grounds of contention are several, and counsel desire to urge upon the Court that none of them are advanced for the mere matter of form.

1. The first assignment of error made, goes to an attack upon the sufficiency of the indictment which involves the charge of error upon the court in overruling the motion to quash the indictment, and overruling the motion made in arrest of judg-

ment, both of which motions were predicated upon the insufficiency and informality of the indictment.

For some reason, the motion to quash the indictment is not printed in full in the record, but that it was filed, argued, considered and overruled, is made to appear by the record of the entry of the Court's order, which is found in this printed record, page 7.

The motion in arrest of judgment again renewed the attack upon the sufficiency of this indictment, and this motion is found in full at page 28 of the record.

It is therefore believed that every possible effort was made by counsel in apt time to relieve the plaintiff in error of the hardships of this indictment. It seems to us that it is a violation of every canon and rule of good pleading, and we will look to that, as it will be seen that in one count it charges Connors with having seized and carried away the ballot box, and in the next line it charges him with knowingly aiding and assisting some one else in the seizure of the ballot box, and in the next line it says that he advised and procured a lot of people to take the ballot box.

Now, when the jury said by their verdict that Connors was guilty, what did they find him guilty of? Did they find him guilty of taking the ballot box, or did they find him guilty of getting some one else to take the ballot box away, or did they find him guilty of advising some one else to take the ballot box? All of these three propositions could

not be maintained at one and the same time.

We want to ask the Court particularly to look at this section under which the indictment was found and discover, if it can, any theory that justifies the Court in abrogating all established rules of either civil or criminal pleading? We may be answered in these objections by the proposition that the punishment is precisely the same thing under this section of the law; that is, it is not divided up so as to punish a man as principal, and again, in another form, as accessory; but that in no wise touches the proposition that when a man is arraigned on a charge of violating the law and committing a crime, it is absolutely the duty of the government to tell him in what manner and form he was guilty of the act complained of. In this instance it was not done, and we are contending that it was error to force the defendant to trial under any such an indictment.

2. The second assignment of error goes to the refusal of the Court to permit counsel for plaintiff in error to interrogate the jurors on their *voir dire* concerning their political convictions and prejudices, if any they had, in the cause.

These questions so sought to be propounded by counsel for plaintiff in error are set forth in full in ourt statement herein, at pages 3 and 4, and are found in the record at page 14. It occurred to us at the time, and we are still impressed with that belief, that this ruling of the Court was a most grievous error, and entailed the greatest hardship

upon the plaintiff in error in his trial. Here was a jury brought into the jury box to try a man for an offense which in itself was particularly associated with the politics of Arapahoe County. The motive which actuated the person who did take the ballot box away was necessarily in the interest of some political faction. This being the case, it was conceived by counsel for plaintiff in error to be the most pertinent inquiry possible in discovering the bias or prejudice of these jurors, to ascertain what were their political affiliations and predilections. Yet the Court, with an iron hand, arrested counsel in this inquiry and positively precluded any inquiry of that sort whatsoever. It is not safe to say that political affiliations would not prejudice the mind of a juror. This is known to any one who has ever engaged in any political strife. In this kind of contention there is raised more bitterness and personal feeling between partisans of respective parties, than in any other walk of life. The authorities cited in support of this are numerous and specifically to the point.

3. The third assignment of error goes to the refusal of the Court to permit counsel for the plaintiff in error to interrogate the witness McKinley touching the effect of the vote in the eighteenth precinct, that being the voting place where it was alleged in the indictment the wrong was committed, and further in refusing to permit counsel for plaintiff in error to introduce certain testimony tending to show the effect of the vote in said precinct.

In support of this contention, we beg to call attention to the record in this particular. Mr. McKinley, on cross-examination, among other things, was asked:

"Q Are you able to state what would have been the effect of your vote and the vote of Mr. Bromley if that precinct had been thrown out?"

Counsel for the people objected, and the Court said:

"You cannot ask that unless he then knew what the effect would be. You cannot ask what he ascertained the effect would be."

He was further questioned as follows:

"Q Who was the candidate immediately opposed to you in that election?

"A Judge Steck was then generally regarded as such, but there were two of us on each ticket; but Judge Steck was then running closer.

"Judge Steck was elected?

"A Yes, sir; and I was elected.

"Q You and your opponent were not both elected?

"A Yes, sir; there were two elected. I was elected on the Democratic ticket and Judge Steck on the Republican ticket.

"Q Who were the defeated candidates?

"A James A. Black on our ticket and Henry Suess on the other.

"Q Was there any contest made about the result or about the counting of the vote in that precinct?

"A Not over my election. I would have been elected anyway.

"Q I did not ask you that. I merely want to know if there was such a contest?

"A There was a contest. There was a contest by Mr. Bromley's side in the legislature, and I know that the evidence about these ballots was given on that. Whether or not the contest was solely based on that, I do not know. It was in the lower house, and I did not have any part in it. I know that they took evidence upon this eighteenth precinct affair in that case, and they had attorneys.

"Q And the integrity and security of Mr. Bromley's seat in the legislature depended on the count in this precinct, didn't it?

This was objected to, and the objection was sustained. See record, pages 18 and 19.

As a further part under this assignment of error, wherein it is claimed that the court erred in excluding testimony offered by plaintiff in error, we call attention to the testimony offered by the witness William Prinn. Mr. Prinn was the deputy clerk and recorder of Arapahoe County, and by virtue of his office had control of the returns of the judges of election and the canvass of the votes. These he produced in Court, and the official records of the previous voting in this eighteenth precinct was at hand to show and maintain what Connor's counsel was contending for; that is, that it was not to the interest of the Republican party, with which he was connected, to in any manner make away with

the ballot box of the eighteenth precinct, because by the proof of all former elections this precinct had been largely in favor of the Republican party. Taking that fact in connection with the other circumstances that McKinley and Perry, and all those who were occupied in searching for the ballot box, and those who were interested in having it counted, were all Democrats, and it is believed that it was a serious injury to Connor's case to be deprived of this class of testimony.

The Court refused to permit this evidence to be introduced to the jury.

Connor's counsel then said:

"We wish to show by the official count of the vote of the eighteenth precinct in the city of Denver for the election of 1890 that the Democratic ticket received a much larger vote than ever before in this particular precinct, and that this precinct had been largely Republican in the previous elections.

The Court said:

"It will be excluded." See record, p. 21.

"The following question was then put to the witness by counsel for plaintiff in error.

"Q Have you figured up from the returns as canvassed by the board of canvassers of the year A. D. 1890, as shown upon that book, the result of the legislative ticket, by counting the vote as returned from the eighteenth precinct, Fourth ward,

of the County of Arapahoe; and, if so, what effect did it have in seating any Democratic member on the legislative ticket?"

This was objected to, and the objection was sustained. Record, pages 21 and 22.

We cannot conceive why this line of testimony should have been excluded. McKinley and Bromley were both Democrats, and it was a conceded fact in this trial that without the count of the eighteenth precinct Bromley, a Democrat, would have been defeated. It was believed, and is still believed, by Connor's counsel that it was a legitimate defense to say, and be allowed to prove, that the Democrats were the ones interested in changing the overwhelming majority of that precinct, and to do that they had to get possession of this ballot box and manage it to their own ends. If these things could be proven, then everything from which a legitimate inference could be drawn was also admissible.

4. The fourth assignment of error goes to the instructions given by the Court, and the portions of these instructions in which it is claimed error was committed will be pointed out in this brief, and can also be found on pages 24 and 25 of the printed record, and are as follows:

It will be borne in mind that the undisputed testimony on the part of the government was, that Connors did not take the box, because he was in the room when the box, was removed. Nor is there one single line or intimation in the testimony that

Connors had anything to do with the removal of the box or that it was by his procurement. The sole evidence upon which the government had to rely was that of the witness Perry, who testified that some several hours after the box disappeared he saw it in Connor's possession. Now the Court, in instructing the jury in the light of these facts, said :

"As I understand the position of counsel for the government, he wishes you to infer from the circumstances of the defendant's being there (that is, in the room with the judges) at this time, that he was there for the purpose of assisting in, or of covering the act of taking; the box being found, as it is alleged, in his possession some two hours or more after that time, it must be assumed from this circumstance, that he was conizant of the manner in which, and of the person by whom, it was taken; and certainly, if the box was found in his posession, as stated by the witness Perry, it would seem to be an almost irresistible inference that he knew the person who had taken it, and was then endeavoring to conceal it."

Thus the court tells the jury, in unmistakable language, that if Connors had the box in his possession he knew who took it, and was either a party to the taking, or it was by his procurement it was taken, as alleged in the indictment, because, further on, in the second succeeding paragraph of the instructions, the court says :

"*So that, as contended before you by counsel, it is very much a question whether the truth is spoken by the witnesses for the government, or by the defendant himself. It must appear to you, in order to establish the charge, from all the circumstances which are disclosed in the evidence, that the defendant was cognizant of the taking, knew who took it, and it was done by his procurement and aid.*"

Here the court tells the jury that they cannot find him guilty unless the evidence discloses that he knew of the taking and it was done by his procurement or aid, and directly in that connection he tells the jury that it is an irresistible inference and they must find, and are authorized to find, that if he had the box in his possession at any subsequent time, the taking of it was by his procurement.

It needs no citation of authority to maintain the irrationality of these instructions; it is illogical in that it instructs the jury to bring in a verdict of guilty.

In support of our contentions against the formality of the indictment, we cite the court to

Wood vs. People, 53 N. Y. 511-13.
North vs. Commonwealth, 2 Gray, 545.
Malone vs. State, 14 Ind. 219.
United States vs. Britton, ~~27~~ 107 U. S. Sup. Ct. ~~698~~ 655.

In support of our contention that the Court erred in denying Connor's counsel the right to interrogate the jury on their *voir dire* touching their prejudices, we cite the Court to

Monaghan vs. Agl. Fire Ins. Co. 53 Mich. 242.

Township of Ostego Lake vs. Kirsten, 40 N. W. Rep. 26.

Chicago & Alton Ry. Co. vs. Adler, 56 Ill. 344.

State vs. Mann, 83 Mo. 589.

People vs. Carpenter, 38 Hunn, 490.

Lavin vs. People, 69 Ills. 303.

People vs. Car Soy, 57 Cal. 102.

Abbott's Trial Brief Cr. Cases, sec. 301.

M. & F. Bank vs. Smith, 19 John. 115.

Clark vs. Ostrander, 1 Cow. 439, note.

Thompson vs. People, 3 Park, 467.

Pinder vs. State, 8 So. Rep. 837.

Theisen vs. Johns, 72 Mich. 285.

Lawlor vs. Linfroth, 72 Cal. 205.

We wish in conclusion to call this Court's attention to a clause in the first part of the record, which reads as follows:

"The matters here recited occurred in the morning hour of the Court. The questions given below were presented after lunch time, and while the examination of jurors was still in progress. The Court did not then observe the character of the fourth question. If attention had been directed to that question it would have been allowed."

Record, page 14.

This was interpolated in the bill of exceptions by His Honor, Judge Hallett. It is there plainly indicated that he regarded his ruling as erroneous,

and seeks to excuse his refusal to allow the question to be asked, upon the ground that his attention was not directly called to that particular question. Counsel could do no more than they did do, when the Court peremptorily refused to allow counsel even to propound questions of this sort, there was nothing else for counsel to do, but to write these questions and submit them to the Court, and this was done, and if the Court did not read them, the injury resulted to the defendant, and that is the grievance that is sought to be remedied.

Respectfully submitted.

E. T. WELLS,
for Plaintiff in Error.

Office Supreme Court, U. S.
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CLERK.

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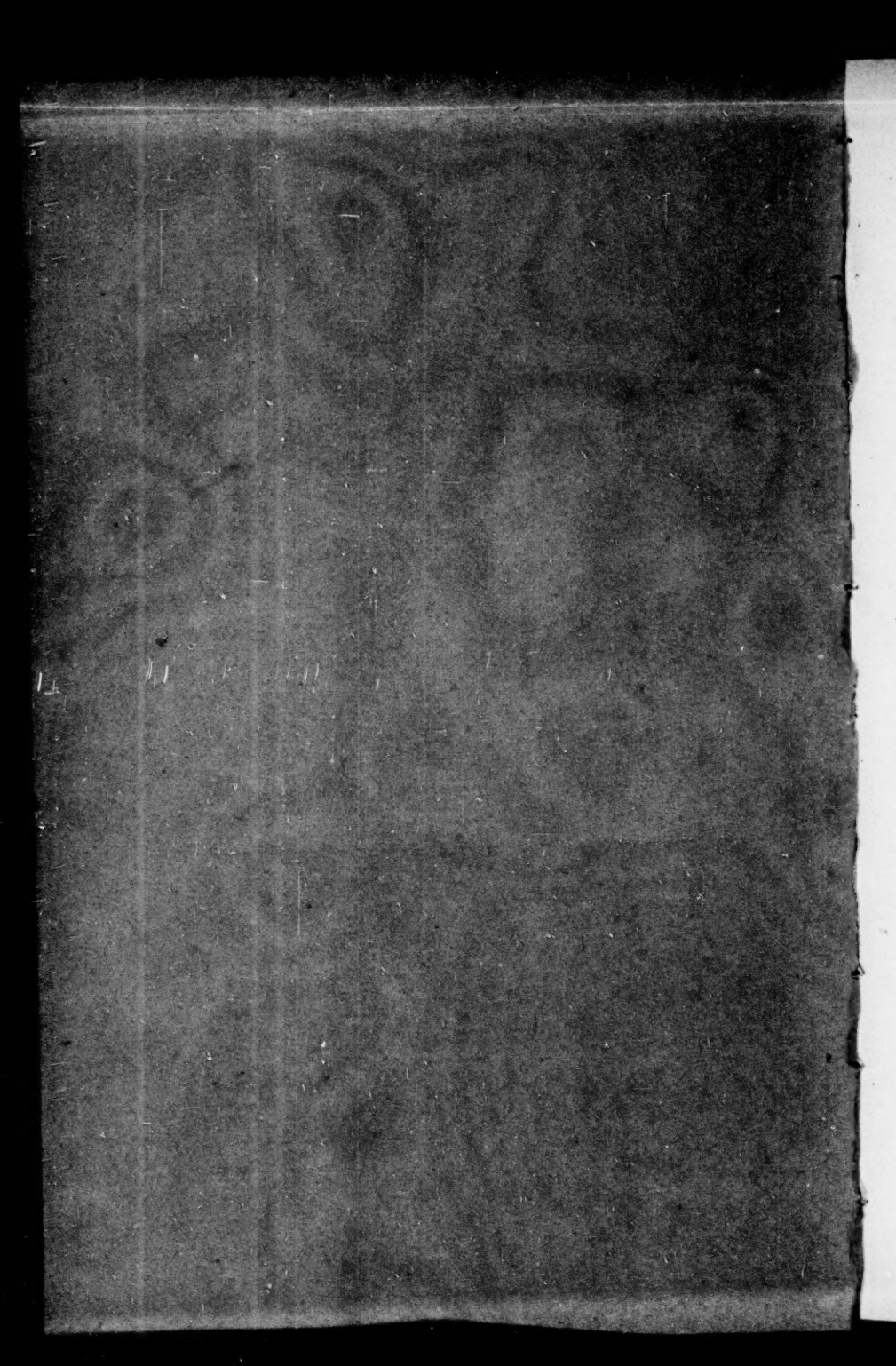

In the Supreme Court of the United States.

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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

BRIEF FOR THE UNITED STATES.

This case is here by writ of error from the district court of the United States for the district of Colorado to review a judgment of that court pronounced on the 6th of February, 1893, on the verdict of conviction upon an indictment charging that the plaintiff in error, James Connors, "did unlawfully interfere with the judges of election of the eighteenth voting precinct in the said county of Arapahoe in the discharge of their duties, which said judges of election were then and there officers of the election for Representative in the Fifty-second Congress of the United States; * * * and did then and there unlawfully, with force and arms, seize, carry away, and secrete the ballot box containing the ballots of the said

eighteenth voting precinct; * * * and did then and there knowingly aid and assist in the forcible and unlawful seizure, carrying away, and secreting of said ballot box; and did then and there counsel, advise, and procure divers other persons, whose names are to the grand jurors unknown, so to seize, carry away, and secrete said ballot box."

ASSIGNMENTS OF ERROR

Will be found on pages 3 to 5 of the record, and will be considered here in a different order from that in which they are there presented.

F. (p. 4):

> For refusing to arrest the judgment on the ground that the indictment was insufficient to sustain a conviction, in that it charged the defendant in one count of being guilty as a principal and as accessory before or after the fact, * * * there being nothing in the verdict or in the proceeding to determine in which capacity he was found guilty.

The alleged defect implied in this motion in arrest of judgment is, that the count was bad for duplicity in embracing in the one count two distinct offenses, either of which might properly have been the subject of a separate count.

It will be observed that there was no demurrer to this indictment, no motion to quash it, and no application to the court to require the prosecutor to elect which one of these offenses so charged the defendant should be tried on. But the defendant preferred to pass by all these methods of relief and rest his objection on his motion to arrest the judgment, and in this we think he has fatally erred.

The three distinct offenses, supposed to be improperly joined in this count, are that the defendant did—

> (1) Unlawfully and with force and arms seize, carry away, and secret the ballot box containing the ballots, etc.
>
> (2) Then and there knowingly aid and assist in the forcible and unlawful seizure of carrying away and secreting of said ballot box.
>
> (3) Did then and there counsel, advise, and procure divers other persons, whose names are to the grand jurors unknown, so to seize, carry away, and secret said ballot box.

In each and all of these the persons so guilty are principals, and the punishment is the same for all.

> If the prosecuting power chooses, all guilty participants in any crime may be joined as defendants in one count. The test has been stated to be to consider whether each offender be guilty in some degree of the same crime, so that he might be separately convicted, even though another was the actual perpetrator. If each may be so convicted their guilt is joint, but otherwise it is several.
>
> At common law principal and accessory, including the accessory after the fact as well as before, may be and commonly are so joined. * * *
>
> Principals of first and second degree may be joined. (1 Bish. Crim. Proc., 3d ed., sec. 467; Bish. Directions and Forms, sec. 114 *et seq.*)

The indictment is brought under section 5511, Revised Statutes, which provides:

> If at any election for Representative or Delegate in Congress any person knowingly * * * interferes in any manner with any officer of such election in the discharge of his duties, * * * or aids,

> counsels, procures, or advises any such voter, person, or officer to do any act hereby made a crime, * * * or attempts to do so, he shall be punished by a fine of not more than $500, or by imprisonment not more than three years, or by both, and shall pay the costs of the prosecution.

From which it appears that the same punishment is prescribed for each of the offenses therein described.

> If an indictment is bad for duplicity, the court may quash it on motion, or it may be demurred to, or at the trial the prosecutor may be put to his election on which charge to proceed.
>
> No authority has been cited [said Mellor, J., in the English court] to show that duplicity is a fatal objection in a criminal case after verdict. But whether that be so or not, I am not aware of any case that decides that the objection is open on a writ of error. And it is very widely, perhaps the prevailing American doctrine, that the defendant can not avail himself of the duplicity after verdict; (1 Bish. Crim. Proc., 3d ed., secs. 442, 443; Wharton's Crim. Plead. and Prac., 9th ed., sec. 255.)

A. (p. 3). The refusal of the court to permit counsel for the defendant to ask the jurors on their *voir dire* the following question (p. 14):

> To what political party do you belong and what were your party affiliations in November, A. D. 1890?

And this was followed by a series of questions to the same effect, which will be found in the bill of exceptions (p. 14).

The court of its own motion arrested the counsel in this line of inquiry and declined to allow the questions to be put.

The fitness of jurors is properly ascertained by questions tending to show their personal bias or idiosyncrasies, but it has never been allowed—and so far as we know has never been attempted—to make the political status of a citizen the test of his qualification as a juror.

It appears throughout this record, and especially on pages 18 and 21, that the two great political parties of the country—the Republican and the Democratic—alone (Prohibitionists also had a ticket, page 16) were represented by their candidates at this election. It would seem to be obvious that if one juror was disqualified because of his sympathy with the party to which the defendant belonged, that another juror was disqualified because of his antipathy to that party, and as there were only two parties and all the men summoned on the venire belonged to one or the other of these two, that all must be disqualified—and consequently no jury could be had in the country to try the accused.

Now, in a trial for bigamy, it was held to be no error to exclude a juror because he believes that the practice of polygamy is in obedience to the will of God. (*Miles* v. *United States*, 13 Otto, 304.) The occupation of a juror may always be shown. But in *United States* v. *Duff* (19 Blatch., 9), it was not permitted to ask a juror if he would give less credit to the testimony of a man in the lottery business than he would to a person not in that business.

Conscientious scruples as to capital punishment or as to the sufficiency of circumstantial evidence, and even as to the validity of a statute, have been held sufficient.

So relationship, business association, prior connection with the subject-matter of the case, participation in a cog-

nate offense, have been held sufficient to exclude. But that a juror is a Free Mason is no cause for challenge if one of the parties to the suit is a Free Mason and the other is not. (*People* v. *Horton*, 13 Wend., 9.)

That one is a member of a temperance society, organized to prosecute persons for violation of a temperance law, has been held good cause for challenge. But that a juror belongs to an association for prosecution of crimes of the same class as that under trial, has been held not sufficient cause for challenge. (*State* v. *Wilson*, 8 Clark (Iowa), 407.)

See generally Wharton's Criminal Pleadings and Practice, ninth edition, sections 653 to 668, where many cases are examined.

B. (p. 4). In refusing to allow defendant's counsel to ask the witness, McKinley, on cross-examination, the following question:

> Are you able to state what would have been the effect upon your own vote and the vote of Mr. Bromley if that precinct had been thrown out? (p. 18).

The court declined to allow this question to be put, saying (p. 18):

> You can not ask that unless he then knew what the effect would be. You can not ask what he ascertained the effect would be.

But in addition to the ground upon which the court excluded the question is the further ground of irrelevancy to the issue.

The defendant was on trial upon the charge of seizing and carrying away a ballot box, containing ballots. Now, whether the result of the election would or might have

been changed by throwing out the entire vote of that precinct has no relevancy to the single question involved here of his guilt or innocence of the crime charged against him.

C. (p. 4). Refusing to allow defendant's counsel to prove by his witness, William Prinn, by the production of the official records of the vote of the Eighteenth precinct for the year 1890, and the two elections previous thereto, that at the election of 1890 the Democratic ticket received a much larger vote than ever before in this particular precinct, and that this precinct has been largely Republican in the previous elections.

The object of this evidence, as well as that offered in the preceding assignment B, appears to be to show a motive for the commission of the offense, to wit: To get rid of the vote of this precinct altogether at this election in 1890; or else, by stealing Republican ballots, to create thereby an apparent Democratic majority.

Such evidence would be very proper and pertinent in a contested-election case growing out of this election; and, indeed, it appears (pp. 18, 19) that in just such a proceeding before the legislature it was used. But its relevancy to the issue here is by no means apparent. It is offered by the defense.

Connors, the plaintiff in error, on page 23, stated in his testimony "he was at that time and is now a Republican. In all elections previous to the one in November, 1890, he had taken an interest in and worked for the Republican party; he knew that in all previous elections this Eighteenth precinct had been very strongly Republican,"

etc. And Mr. Adams, who was one of the judges of election, states (p. 16) that "it was a Republican precinct, and had been at former elections a Republican precinct."

Mr. Patton (p. 16) testifies that he was acting as a Republican judge of election at that precinct; that he saw the broken box, after it had been recovered, and counted the ballots; found about 450. "There were four or five ballots missing; they were the same ballots that had been identified during the day."

Mr. McKinley, who was a candidate for the office of State senator, and voted for at that precinct, states, on page 18, that he was elected on the Democratic ticket and that Judge Steck, his opponent, was elected on the Republican ticket; that they were both elected.

We suppose the argument to be that as Mr. Connors, the plaintiff in error, was a Republican, and that as the object in stealing these ballots was to procure a Democratic majority at this precinct, that such a motive could not be imputed to Mr. Connors as being contrary to his political inclination, and that, therefore, it was not he who stole the ballots.

Well this seems to be altogether too remote and fanciful to be admitted as evidence relevant to the issue. Whatever may have been Mr. Connors's political faith, he certainly exhibited on that occasion a quite remarkable and altogether unexplained intimacy and familiarity with Mr. McKinley, a Democratic candidate, and Mr. Perry, a Democratic "watcher over the election" at that precinct (p. 20).

There can be no doubt, from Mr. Perry's testimony, that Connors had the stolen ballot box in his possession and

was concealing it under his coat, and that it slipped and fell on the pavement and was broken, and the ballots scattered.

Had evidence been offered on behalf of the Government tending to show a motive of the plaintiff in error for the commission of the offense, there might have been ground for the introduction of evidence by the defendant in rebuttal. But to allow the defendant to offer evidence tending to show that a possible result from the loss of ballots might have led to results not in accord with the political faith of the defendant, does not exclude or tend to exclude the conclusion that he may have had other motives, not political, but personal and far stronger.

The effect of the two questions in assignments B and C was only to show that this precinct was Republican, and that the loss of ballots might make it Democratic.

Now the test of relevancy is stated by Dr. Wharton (Wharton's Crim. Ev., 8th ed., sec. 24) to be—

> (1) Ought the hypothesis proposed, if proved, to affect the issue.
>
> (2) Does the fact offered in evidence go to sustain this hypothesis.

In this case we think both of these inquiries must be answered in the negative.

Revolutions, radical and overwhelming, by which majorities which at one election were so great as to repel the hope of future reduction, have at the succeeding election been shifted to the opposing party, are too frequent and recent in our experience to justify any inference of permanence or stability to be even suggested.

But admitting that the precinct was Republican, could that fact affect the issue here? Only as bearing on motive, and there we have seen the bearing is too remote and indirect to justify the introduction of evidence which must necessarily be inflammatory.

D (p. 4) is to a part of the charge delivered by the court to the jury. This will be found in the bill of exceptions on page 24, and is as follows:

> As I understand the position of counsel for the Government, he wishes you to infer from the circumstance of the defendant being there at this time that he was there for the purpose of assisting in or of covering the act of taking. The box being found, as it is alleged, in his possession some two hours or more after that time, it must be assumed from this circumstance that he was cognizant of the manner in which, and of the person by whom, it was taken; and certainly, if the box was found in his possession, as stated by the witness, Perry, it would seem to be an almost irresistible inference that he knew the person who had taken it and was then endeavoring to conceal it.

An attentive examination of this extract will show that it was intended to, and doubtless did, convey to the mind of the jury a very different impression from that which counsel would now have it make upon the mind of this court.

Down to the words "and certainly," the judge was stating, not his own position, but what he understood to be the position of counsel for the Govenment. He states, first, what the counsel for the Government wishes the jury to infer from the circumstances of the defendant's being there at that time, and that was "that he was there for

the purpose of assisting in or of covering the act of taking." He then proceeds to state the argument of counsel for the Government from such inference, and that was that—

> The box being found, as it is alleged, in his possession some two hours or more after that time, it must be assumed from this circumstance that he was cognizant of the manner in which, and of the person by whom, it was taken.

Counsel for the plaintiff in error here assigns this statement as an error of the court as though the court had instructed the jury that "it must be assumed from this circumstance that he was cognizant," etc.; whereas it is manifest that the court used that language in no such sense, but did use it only to state what the court understood to be the argument of counsel for the Government "from the circumstance" already stated.

All that the judge said to the jury in this extract from his charge was—

> And certainly *if the box was found in his possession as stated by the witness, Perry*, it would seem to be an almost irresistible inference that he knew the person who had taken it and was then endeavoring to conceal it.

And upon looking at Mr. Perry's testimony, upon page 19, no one can well differ with the judge in the opinion he expressed. But it must be also observed (pp. 24, 25) that after making this statement the judge immediately stated to the jury the defendant's side of the case, and instructed them—

> It must appear to you, in order to establish the charge, from all the circumstances which are dis-

> closed in evidence, that the defendant was cognizant of the taking, knew who took it, and it was done by his procurement and aid. * * * I have to say to you that in this, as in all cases of a criminal nature, the facts must be plainly made out. You must believe them to be fully proved; or, as it is usually expressed, there must be no reasonable doubt in your minds upon the evidence as to the truth of the fact.

(Since writing the foregoing we have received and examined the brief of counsel for plaintiff in error, and we find on page 11 of that brief the learned counsel actually understands the sentence beginning, "It must appear to you," etc., as quoted above, was a positive mandate from the court to the jury to find the defendant guilty of taking the box, if they found that he had the box in his possession subsequent to the taking; whereas the plain meaning of the judge was, that the jury could not find the defendant guilty of the taking, or of cognizance thereof, unless it so appeared to them "from all the circumstances which are disclosed in the evidence.")

We have examined all of the cases cited on page 12 of the brief of counsel, and we do not find a single case that sustains or tends to sustain the right to interrogate the jury on their *voir dire* as to their political faith or associations.

E (p. 94). The refusal to grant a new trial is not ground of error here.

HOLMES CONRAD,
Assistant Attorney-General.

Office Supreme Court, U. S.
FILED
JAN 14 1895
JAMES H. MCKENNEY,
Clerk

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

JAMES CONNORS, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 512.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

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SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

Under the order of the 7th day of January, 1895, restoring this cause to the docket, and extending to counsel leave to file additional briefs of argument, I beg to present the following supplemental considerations.

A careful reexamination of the record discloses no apparent error, unless such be found in the questions submitted to the court below, by counsel for plaintiff in error, to be propounded to the members of the jury.

These questions will be found on page 14 of the record. All of them, except the fourth, relate to the conduct or

previous actions of the members of the jury. The fourth question relates to the state or attitude of their minds toward the accused, and is in the following words:

> Would your political affiliations or party predilections tend to bias your judgment in this case, either for or against this defendant?

In 1 *Thompson on Trials* (sec. 102, p. 103) it is said:

> Where a venire man is challenged on the ground of bias, prejudice, or opinion, a very wide range of inquiry is permissible for the purpose of ascertaining the real extent to which his mind is affected for or against either party.

The court below in this case refused to allow these questions to be propounded to the jury; but it does not distinctly appear in this record upon what ground this action of the court was based. It does appear, however, page 14, as part of the bill of exceptions, that the questions were submitted to the court under the following conditions:

> The matters here recited occurred in the morning hour of the court. The questions given below were presented after lunch time, and *while the examination of the jurors was still in progress.* The court did not then observe the character of the fourth question. If attention had been directed to that question it would have been allowed.

This statement suggests a view of the case that has not heretofore been presented.

Unless some other reason existed than the relevancy of the question, or its sufficiency, it is difficult to see why the court below, although recognizing the propriety of

the question and acknowledging that it would have been admitted if attention had been directed to it, yet did not, for that cause set aside the verdict and grant a new trial of the case.

Its action can only be justified on the ground—

(1) That it otherwise appeared to the court in the course of the preliminary proceedings that the matter of the prejudice or bias of the jurors had been fully gone into and searched by other questions propounded to them in the course of preliminary examination; or,

(2) That the questions, although proper in form and pertinent to the subject of inquiry, were not offered at the proper stage of the proceedings, and for that cause were not allowed, and their rejection can not be assigned for error here.

The bill of exceptions is the only source to which recourse can be had here to ascertain the course of the proceedings had in the court below on the trial of this cause. This may be, perhaps, corrected by the admissions of the parties.

In the assignment of errors (p. 3) the manner in which these questions were submitted is stated to have been as follows:

> Your petitioner's counsel then wrote out, in plain, legible handwriting, seven questions which he desired to ask of the jurors, and handed same to the judge of the trial court. But each and every one of the questions were by the court excluded, and counsel was refused permission to ask the same.

On page 14 it appears, from the extract above quoted from the bill of exceptions, that "the questions given

below were presented after lunch time, and *while the examination of jurors was still in progress.*"

From which it is manifest that the seven questions contained in the paper handed to the judge, and his refusal to allow which is assigned as error here, were not *all* the questions propounded to the jurors on the subject of their fitness. These questions were proposed "while their *examination* was still in progress."

Their "examination" could only have been upon the same subject as that embraced in these rejected questions.

In Thompson on Trials, treating of the general subject of challenging and impanelling juries, it is said (sec. 118, p. 124):

> Here, as in all other cases where the rulings of the trial court are questioned on error or appeal, those rulings are *presumed* to be correct until the contrary is shown. It will therefore be presumed, until the contrary appears by the record, that the jurors who tried the case were possessed of the qualifications required by law.

And in section 119:

> A general statement of principle would be that those steps in the procedure which are matters of vital or constitutional right to the accused in a criminal case must affirmatively appear by the record, though not necessarily in the form of specific recitals, and that in respect of matters of minor importance the presumption spoken of in the last section will support the judgment.

Here, then, it appears that the only appropriate and proper subject on which these jurors could have been examined was as to their fitness to sit as jurors in that

case. It appears that their examination was "still in progress" when, on behalf of defendant, certain questions, stated in writing, were handed to the judge, to be put to the jurors. He declined to allow these questions to be put. His reason for declining does not appear in the record. In the absence of anything to the contrary he must be presumed to have acted rightly, and it is suggested, in support of this presumption, that his reason for refusing these questions to be then propounded was that they had already been put to and answered by the jurors in the course of their examination, which was "still in progress."

But, again, it does appear, I submit, affirmatively in this record that these questions directed toward ascertaining the fitness of the jurors were not proposed at the proper stage of the case.

In Wharton's Criminal Pleading and Practice (9th ed., sec. 672) it is said:

> The challenge, either by the prosecution or the defense, must be before the oath is commenced, down to which period the right exists.

Now, the statement of this transaction as it is certified in the bill of exceptions (p. 13) is as follows:

> Be it remembered, that on the trial of this cause, * * * on the 19th day of November, A. D. 1892, a jury having been duly selected, impaneled, and *sworn to try the same*, the United States, to maintain the issues herein on their behalf, gave evidence tending to prove the following facts, that is to say, and also upon the examination *of* the jurors, who were impaneled and sworn to try such issues on their *voir dire*, were asked certain questions by counsel for

> the defendant touching their competency as jurors, and among such questions the first juror so examined by counsel, James K. Stewart, was asked a question in these words, or in words of similar import.

From which it appears that "a jury having been duly * * * sworn to try the same" were sought to be examined on their *voir dire* as to their competency as jurors.

It will be objected to this view that the bill of exceptions was not artificially or accurately drawn, and does not correctly state the proceedings in their actual order of event. I reply that the bill of exceptions was prepared and tendered by the plaintiff in error; that the assignments of error were made by him, and that it is unreasonable for him to ask in the prosecution of his own writ of error that proper and reasonable presumptions in favor of the rightfulness of the proceedings of the court below and of the correctness of the record made thereof should be disregarded in support of this writ.

THE FORM OF THE QUESTION.

It may well have been rejected on the ground that it was altogether speculative and not at all practical or calculated to elicit a reply that would throw any light on the question of a juror's competency.

The question is not, "Are you conscious of any bias for or against the accused by reason of your political affiliations?" etc.

But the question is, "*Would* your political affiliations or party predilections *tend* to bias your judgment in this case?" etc.

Suppose they did "tend" to do it; every relation which a man sustains in life, if he has sufficient strength of character to entitle him to the rights of citizenship, must "tend" to bias his sentiments and judgments. A juror who is a member of one political party, or of one religious society, or of one social organization, would naturally, reasonably, and properly tend to agree with those who in these relations think and feel as he does.

His sense of duty, however, as a juror, the weight of the obligation of the oath which he has taken, the desire of the approval of his own conscience all combine to resist this tendency, and constrain and incline him, despite the tendency, to do that which is right.

In every criminal case jurors on their *voir dire* admit that they have formed opinions and are conscious of inclinations and tendencies, but that these can all be overcome by evidence, and do not disable them from rendering a fair verdict.

But even as to this the question is not do these tend, or will they tend, but *would* they tend.

It may seem to be "standing on the ninth part of a hair" to suggest what appears to be an excessive refinement, but it must be remembered that it is the framer of this question who is complaining of the court below because that court rejected the question, and that court is entitled to the presumption that it acted properly, and the record must show affirmatively that the question was a proper one in form, that the matter which it sought to elicit was not already in evidence, and that it was proposed at the right time—I say the record must show this

affirmatively, because if it affords room to believe that the question was improper upon either of these grounds it must be presumed that the ground existed and was apparent to the court.

HOLMES CONRAD,
Assistant Attorney-General.

—IN THE—

SUPREME COURT

—OF THE—

UNITED STATES

OCTOBER TERM, 1894.

JAMES CONNORS,
Plaintiff in Error,

vs.

THE UNITED STATES,
Defendant in Error.

No. 512.

Error to the District Court of the United States for the District of Colorado.

REPLY OF PLAINTIFF IN ERROR TO THE SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

E. T. WELLS,
MORTIMER F. TAYLOR,
for Plaintiff in Error.

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—IN THE—

SUPREME COURT

—OF THE—

UNITED STATES

OCTOBER TERM, 1894.

JAMES CONNORS, *Plaintiff in Error,* vs. THE UNITED STATES, *Defendant in Error.*	**No. 512.** *Error to the District Court of the United States for the District of Colorado.*

REPLY OF PLAINTIFF IN ERROR TO THE SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

May it please your Honors:

We ask the pardon of the Court for trespassing some further on the Court's attention in this case, but there are some matters contained in this sup-

plemental brief for the United States that we think justify notice from us. The issue in this case is one of such great importance to our client that we do not feel at liberty to leave any stone unturned in bringing sharply to the attention of the Court every question raised upon the record. What we have to say here will be confined to the matters set up in the supplemental brief of counsel for the government, but not for one moment yielding the position heretofore taken by us upon the other assignments of error raised upon the record. Indeed, we believe that all of our assignments are good, and that from the beginning to the end, plaintiff in error was denied a fair trial.

It will be stating a truism were we to commence an argument upon the right of every suitor to an impartial, unprejudiced and unbiased panel of jurors. This we think, upon this record, the plaintiff in error did not have, and the reason why we say this is because his counsel were denied the plain right to interrogate the jurors concerning their predilections and their bias, and this denial was under such circumstances as to aggravate the injury done at the trial.

On page three of this supplemental brief, we find the following: "Its action can only be justified on the ground:

"First—That it otherwise appeared to the court in the course of the preliminary proceedings that the matter of the prejudice or bias of the jurors

had been fully gone into and searched by other questions propounded to them in the course of the preliminary examination; or,

"Second—That the questions, although proper in form and pertinent to the subject of inquiry, were not offered at the proper stage of the proceedings, and for that cause were not allowed, and their rejection cannot be assigned for error here."

The bill of exceptions is the only source to which recourse can be had here to ascertain the course of the proceedings had in the court below on the trial of this cause. This may be, perhaps, corrected by the admission of the parties.

The reasoning that follows in support of this position seems to us, to be the very midsummer madness of argument. Not only does it narrow and limit what took place at the trial, but performs a perfect circle in argumentation.

The bill of exceptions in this case, found commencing at folio 27, page 13, and ending folio 29, page 14, contains the following:

"Be it remembered that at the trial of this cause, before the Honorable Moses Hallett, judge, at the November term, A. D. 1892, of said court, to-wit, on the 19th day of November, A. D. 1892, a jury having been duly selected, empanneled and sworn to try the same, the United States, to maintain the issues herein on their behalf, gave evidence to prove the following facts—that is to say, and also

upon the examination of the jurors who were empanneled and sworn to try such issues on their *voir dire* were asked certain questions by counsel for the defendant touching their competency as jurors, and among such questions the first juror so examined by counsel, James K. Stewart, was asked a question in these words, or in words of similar import:

"Q To what political party do you belong, and what were your party affiliations in November, A. D. 1890?"

Whereupon the court stopped counsel and said that the question could not be propounded, and the juror could not be called upon to answer such a question, or any question of similar import touching the juror's political beliefs or attachments.

Counsel suggested to the court the propriety of such line of inquiry, if for nothing else, to enable counsel to exercise peremptory challenges for the defendant intelligibly, but the court excluded such questions and answers, and declined to permit counsel for defendant to interrogate the said juror, Stewart, or any of the jurors upon that line of inquiry.

The matters here recited occurred in the morning hour of the court. The questions given below were presented after lunch time and while the examination of jurors was still in progress. The court did not then observe the character of the fourth

question. If attention had been directed to that question it would have been allowed.

Counsel for defendant prepared and submitted in writing a number of questions they desired to ask the said jurors, and all other jurors, upon that subject, which questions are in the exact words and figures as follows:

"Q Did you take an active part in politics in the last general election of A. D. 1890; and, if so, on which side?

"Q Did you take an active part in politics the last general election of A. D. 1892; and, if so, with which of the parties did you affiliate, and where?

"Q Have you been heretofore or are you now strongly partisan in your political beliefs?

"Q Would your political affiliations or party predilections tend to bias your judgment in this case either for or against this defendant?

"Q Were you ever at any time a member of what was and is known in the city of Denver, county of Arapahoe, and state of Colorado, as the Committee of one Hundred?

"Q Were you ever at any time a judge or clerk of an election; and, if so, when and where, and by what party were you named and appointed?

"Q Are you a member of any political club organized for the advancement of the interests of any political party; and, if so, what party?

"Which questions, and each of them, were by the court excluded, and counsel was refused the

permission of asking the same; to which ruling of the court counsel for defendant then and there excepted."

We desire to fix the attention of the your Honors to this portion of what the record shows took place at the trial:

(Folio 28.) "Whereupon the court stopped counsel, and said that the question could not be propounded, and the juror could not be called upon to answer such a question, or any question of similar import touching the juror's political belief or attachments.

"Counsel suggested to the court the propriety of such line of inquiry, if for nothing else, to enable counsel to exercise peremptory challenges for the defendant intelligibly, but the court excluded such questions, and declined to permit counsel for defendant to interrogate the said juror, Stewart, or any of the jurors, upon that line of inquiry."

When the bill of exceptions was tendered, as is very apparent from the record, and what has been heretofore said in other of the briefs filed, the trial judge, as a sort of excuse or apology for having refused to permit counsel to pursue this line of inquiry, interpolated into the bill of exceptions the following:

"The matters here recited occurred in the morning hour of the court. The questions given below were presented after lunch time, and while

the examination of jurors was still in progress. The court did not then observe the character of the fourth question. If attention had been directed to that question it would have been allowed."

Now, the counsel for the government argues from this, that your Honors will presume that this line of inquiry must have been pursued, as he says, "In the absence of anything to the contrary, he must be presumed to have acted rightly, and it is suggested, in support of this presumption, that his reason for refusing these questions to be then propounded was, that they had already been put to and answered by the jurors in the course of their examination, which was still in progress."

We answer to this, that it is not to be presumed that the trial judge would so far stultify himself as to sign and seal and put upon the record a statement in the way of a bill of exceptions, purporting to give all that took place at the trial pertinent to the matter sought to be preserved in the record, and let that record speak falsely on that subject. The presumption is just the other way, that what was set down and tendered as a complete memorandum of the occurrances at the trial was accepted by the trial judge as complete in itself and that no reason was given by the trial judge for excluding these questions, and that when the bill of exceptions undertook to quote him as having ruled that the juror "could not be called upon to answer such a

question or any question of similar import touching the juror's political beliefs or attachments," or, further, "but the court excluded such questions and answers and declined to permit counsel for the defendant to interrogate the said juror, Stewart, or any of the jurors upon that line of inquiry" that the bill of exceptions spoke the absolute truth as to what took place.

Enough is preserved in the record to advise your Honors that the trial judge peremptorily refused not only to permit these questions to be asked, but refused to permit any such line of interrogation; refused to permit counsel to orally examine the jurors touching any of the matters contained in this line of inquiry, and forced them to the hard necessity of writing out the questions and submitting them to the court for his inspection.

Under this state of facts, what more could counsel do, being denied the privilege of oral interrogation of the jurors, than to write out his questions, submit them to the court, and submit to such ruling as it was his pleasure to make upon the matter tendered? It was not within the power of counsel to compel the court to assign any reason for excluding this line of interrogation. It is no blame of counsel that the court did not do so, and placed upon the record a bill of exceptions which was entirely silent as to any reason the court may have had in excluding this line of inquiry, and we say again it is no answer to the error to say that the

trial court failed to carefully inspect the questions after he had compelled this method of presenting them, and it was with him and with him alone, to make a careful examination, and guard the interests of the suitor who was upon trial before him, that all the safeguards provided by law should be thrown around his trial.

After having put him upon the country with an indictment, which we say violates all of the rules of pleading, the trial court next denies him the right to pursue a line of interrogation absolutely essential for the guidance of his counsel in selecting impartial and unbiased jurors to try the facts.

We are fully advised of the rule laid down by Judge Thompson in his work on Trials, that after the jury trial it is to be presumed that the jurors who tried the case were possessed of the qualifications required by law, unless the contrary is shown by the record. It is this very rule we invoke in this case, for we insist that this record does show that the suitor was denied the right to pursue the method pointed out by the plain rules of law in ascertaining before the jury was sworn just who were and who were not qualified to sit.

It does not serve to say that this line of inquiry may have resulted in disclosing nothing to the disqualification of these jurors, nor had the jurors answered all the questions, that counsel for the plaintiff in error would have exercised differently his right of peremptory challange, for we say,

that having been stopped at the threshhold in pursuing the methods provided by law for intelligently advising him and his counsel as to who was qualified and who was not, as to who should be peremptorily challenged and who should be left in the panel, constitutes the gravamen of his complaint and the ground upon which he is entitled upon this branch of the case to a reversal of the judgment. And this error is abundantly preserved in the record and perfectly apparent upon any, even casual, fair examination of it.

But after having argued very earnestly upon the theory that these questions may have been a part of a series not preserved in the record and may have been excluded because other questions not preserved in the record may have covered the ground, counsel for the government goes on with a refinement of reasoning that may be satisfactory to himself, to say that this record shows that these questions were propounded to the jurors after they were sworn to try the case. The statement is so startling that we desire to quote his own language, on page six of the brief:

"From which it appears that 'a jury having been duly sworn to try the same' were sought to be examined on their *voir dire* as to their competency as jurors."

Or, in other words, he attempts to make this record speak as if these questions were sought to

be put to the jurors after they were sworn to try the case, as if counsel were grossly ignorant enough to suppose that they were still open for examination touching their qualifications, and that therefore, the time having passed for their examination in this regard, that the court properly excluded the inquiry.

From our standpoint, we would not have had the temerity to have advanced such an argument as this, upon the face of this record to your Honors. Certainly the trial judge, whose duty it was to assist in making up this record and to verify it by his signature, had no such idea in his own mind, for he says himself, in his memorandum annotation, that these matters were proposed while the examination of the jurors was still in progress, and he then makes the record quote him as having excluded the entire line of inquiry for reasons that seemed good to himself, and for equally good reasons to himself kept them within his own breast and not inserted into the record for guidance of an appellate tribunal.

Passing on to the discussion in this supplemental brief, intending, as we suppose, to criticise the form of this question, counsel for the government proceeds to a discussion of the law of jury trials, which we will do him the credit to say, is entirely his own. We do not know what kind of a jury he thinks is a fair trier of a disputed fact, but the books say that it must be an impartial and

unbiased jury. If he has formed opinions and has predilections for or against the suitor, requiring testimony to overcome, then he is not fit to suit in the trial of the case. When the law says he must be impartial, unbiased and unprejudiced, it means just what it says, and it is not to be forgotten that in these examinations preliminary to the swearing in of a jury to try a case, suitors are not limited to a challenge for cause, but they have a right, as we have said before, to purge the consciences of the jurors, ascertain their associations and predilections so that an intelligent peremptory challenge can be exercised, for the right of challenge for cause and peremptory challenge lie upon the same plane, if, indeed, it may not be said that the right of peremptory challenge is more tenderly regarded by the court than the challenge for cause. No rule of law governs or must govern the suitor in excluding from the jury the number of persons permitted him by the law. His reasons for his action are his own. No matter how silly or sentimental they may be, in the wisdom of law he is given a certain number of peremptory challenges that he may waive or exercise at his own will, and without suggestion or control from any source. We cannot follow learned counsel for the government along the narrow path of his argument in this regard, nor express any view with reference to it without sharp criticism, which we think unnecessary in this connection. He also makes labored argument

on the form of the question. Our answer to that is, that the trial court seems not to have agreed with him in his reflections on this point, for, says the trial court, had he observed and reflected upon this question he would have allowed it. He does not pretend to say it was not in proper form, or was not a proper question, and did not fall within the line of a proper inquiry. He excuses its rejection on the ground plainly stated, that he did not see it. We beg your Honors to agree with us that the liberties of the citizen are not to be trifled with in this way. That when the trial court refuses to permit counsel to make a record in his own way, and push his line of inquiry within legitimate bounds, to the point of ascertaining all he is entitled to ascertain before he makes challenge, and forces him to the unusual course of writing out his questions then excludes them without reading them, he makes the error all the more erroneous.

But this inquiry shall not be narrowed down, if we can avoid it, to one question. We repeat that two more, if not all, of these questions were clearly allowable, and their rejection erroneous. Here was a trial originating in a controversy entirely political in its nature. This record discloses that the indictment, prosecution and trial all followed closely upon the heels of a bitter political contest, in which common experience teaches us much ill-feeling must have been engendered. Evidently, from the line of interrogation sought to be

made, the suitor and his counsel had knowledge of some organization within this vicinage brought together for the purpose of prosecuting political offenders and *non-constat* this jury might have been composed entirely of members of this organization pre-pledged to carry out its purposes and to work in harmony with their associates to that end. True it is they may have answered that notwithstanding that association they were still capable of obeying the law and fairly trying the facts, but the suitor and his counsel would still have the right to reject their *quantum* of these jurors, and mayhap put into the panel others not subject to the same condition or to the same influence. The questions involved on this branch of the case are of vital importance within this jurisdiction as well as many other jurisdictions throughout the country, and is now receiving, as your Honors well know, attention from trial courts throughout the land. The political situation is not dissimilar to that in existence at the time of the trial of the case of the People vs. Reyes et al. reported in the 5th California, at page 347. As your Honors will remember, there was a secret organization known as the Know Nothings, not unlike what is now known as the American Protective Association. In the trial of the case *supra*, the following questions were put to the jurors:

"1. Are you not a member of a secret and mysterious order known as, and called, Know Noth-

ings, which has imposed on you an oath or obligation, beside which an oath administered to you in a court of justice, if in conflict with that oath or obligation, would be by you disregarded?

"2. Are you a member of any secret association, political or otherwise, by your oath or obligation to which, any prejudice exists in your mind against Catholic foreigners?

"3. Do you belong to any secret political society known as and called by the people at large in the United States, Know Nothings? And, if so, are you bound on oath, or other obligation, not to give a person of foreign birth, in a court of justice, a fair and impartial trial?

"4. Have you at any time taken an oath, or other obligation of such a character, that it has caused a prejudice in your mind against foreigners?

"5. Are you under any obligation not to extend the same rights, privileges, protection and support to men of foreign birth, as to native born American citizens?

"6. Have you any prejudice whatever against foreigners?"

This court overruled all of the foregoing questions in that case, and this was the sole ground upon which the case was sought to be reversed. We beg the court to compare this line of inquiry with the one sought to be pursued in the case at bar, and they are as nearly identical in their legal

consequences to the suitor, as it is possible for two cases to be. The court used the following language, which is so cogent, and its reasoning so applicable to the case at bar, and expresses the law so clearly, that we are moved to set down what was said:

"Wherever the right of trial by jury exists, the law in all cases contemplates that each and every juror who sits in a cause should have a mind entirely free from all bias or prejudice of any kind whatsoever. In order to arrive at the condition of the person's mind who is offered as a juror, a party is permitted to ask of the person himself questions, the answers to which may tend to show whether he is prejudiced or not in the cause which he is about to undertake to decide.

"Prejudice is a state of mind which, in the eye of the law, has no degree. If the juror is prejudiced in any manner, he is not a fit or proper person to sit in the box.

"To ascertain whether a bias exists in the mind of the juror, resort must be had to his declarations to others, or to his sworn statements when interrogated. Applying this test, then, how is it possible to ascertain whether he is prejudiced or not, unless questions similar to the foregoing are propounded to him?"

It would appear, then, from the record, that the trial court not only excluded these particular questions, but it declined to allow counsel to pursue this

line of inquiry at all, and even though the matters propounded might not have been in form or in substance such as the law entitled the suitor to put to the jurors, this of itself would not excuse the trial court for the plain error in announcing, as the record shows he did, that this line of inquiry would not be permitted at all. The court might well have excluded many questions that counsel sought to put to the jurors and relying on them, and giving a reason for such ruling as question after question was propounded, would necessarily have advised counsel what was in the mind of the court as to his right of interrogation, and the line he would be permitted to pursue. But in this case the court cut him down at the very threshhold by not permitting him to make any inquiry of this kind at all. And in order to preserve any sort of a record of what line of inquiry he proposed, counsel was compelled to write out and hand up to the court the questions he sought to ask. And if this ruling be good, then with equal propriety, had this been a controversy between a Catholic and a Protestant, the court could have excluded, and should have excluded every question tending to show that the jurors were pledged to an oath-bound organization pledged to hostility against Catholics, as in the case in the early fifties when the Know Nothing organization was powerful in this country, and the line of questioning was approved in the case from California quoted above.

We reiterate, may it please your Honors,

First—This indictment is bad for duplicity, and that attention of the trial court was called to it in apt time and in formal manner.

Secondly—There was grievous reversible error committed in not permitting the examination of the jurors upon the line of inquiry sought to be put to them, and that this line of inquiry so sought to be made was at the time in the trial where it properly belonged, and that the record abundantly preserves a memorandum of what took place at the trial, disclosing the truth of our position.

Thirdly—That the trial court, in instructing the jury, used language not only misleading, but stated a plainly erroneous proposition of law in that it told the jurors that the discovery of this box in the hands of the plaintiff in error two hours or more after it had been taken was distinctive proof of the fact that he had taken it, or advised it to be taken, which was a deduction the court was not at liberty to draw, and that it was error to tell the jurors that guilt was shown if it appeared from the evidence that plaintiff in error knew who took the box, or received it from the person who did take it, after it had been taken, for that this knowledge is not guilty knowledge *per se*, and constituted no justifiable ground upon which a conviction could be had.

We here renew our earnest request to your Honors to permit this case to be re-argued before the full bench, excusing ourselves on the ground that there seems to be some apparent difficulty in the minds of your Honors about coming to a conclusion, and that the interests of our client are, as it seems to us, of sufficient importance to justify a careful and exhaustive examination and oral argument from the record of the whole case.

All of which is respectfully submitted.

E. T. WELLS,

MORTIMER F. TAYLOR,

for Plaintiff in Frror.

FILED.
JAN 16 1886
JAMES H. McKENNEY,
CLERK.

—IN THE—

SUPREME COURT

—OF THE—

UNITED STATES

JAMES CONNORS,
Plaintiff in Error,
vs.
THE UNITED STATES,
Defendant in Error.

No. 512.

Supplemental Brief on Re-Submission.

E. T. WELLS,
MORTIMER F. TAYLOR.
For Plaintiff in Frror.

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No. 512.

Supplemental Brief on Re-Submission.

In amplification of what was said for plaintiff in error in the original brief filed in this case, we will ask the court to examine what is here said as well as additional authorities, cumulative of the original brief in support of the positions heretofore taken

by plaintiff in error as ground for reversal in this case.

Since the original brief was filed counsel for the United States have filed a brief, and with that before us, we are able, in a measure, to join issue with much that is urged in support of the judgment herein sought to be reversed.

By an examination of page two of the brief of counsel for the United States, the court will notice that our attack upon the indictment is met in this way: "It will be observed that there was no demurrer to this indictment, no motion to quash, and no application to the court to require the prosecutor to elect which one of these offences charged, the defendant should be tried on. But the defendant preferred to pass by all these methods of relief and rest his objection on his motion to arrest the judgment, and in this, we think, he has fatally erred."

The court will notice that the motion to quash does not appear in full in the printed record, although we are well assured that it is preserved in the record, and was no doubt an oversight in failing to print it, for, by an examination of page 7 of the printed record, at folio 15 thereof, it appears on the 12th of February, 1892, before his Honor, John A. Riner, district judge, a motion to quash this indictment was interposed, and by the court overruled, so that it would seem that this action has escaped the attention of counsel for the government, and we might content ourselves for the time being, with

the concession or partial admission contained in the brief that if such motion had been interposed in apt time and by the court overruled, that it would constitute ground for error justifying the reversal of this case. But we recognize the fact that this court will do the very right in the case as advised by the record without regard to concessions on either side, and for that reason we shall deal with the duplicity in the indictment as though our charge against it were met and sought to be overthrown on grounds effective, were the discussion before the trial court when the attack on the indictment was made by this motion to quash.

We may say, however, that this court, in the United States vs. Gooding, 12 Wheaton, 460, held that objections to the form and sufficiency of an indictment may be discussed and decided during the trial, or should generally be considered only on a motion to quash or in arrest of judgment or on demurrer. There is no question upon the printed record but what a motion in arrest was made, and the specific grounds upon which objection to the indictment was taken, were set down and specified, and were clearly adequate to advise the trial court that complaint was made of the duplicity of this indictment.

In the United States vs. Cruikshank et al., 92 U. S. p. 552, the question whether the indictment had certainly advised the defendant of the crime with which he was charged, came on for review in this court on error to the Circuit Court of the

United States for the district of Louisiana. At page 557, the court uses the following language: "In criminal cases prosecuted under the laws of the United States, the accused has the constitutional right to be informed of the nature and cause of the accusation. Amendment VI. In United States vs. Mills, 7 Pet. 142, this was construed to mean that the indictment must set forth the offence with clearness and all necessary certainty to apprise the accused of the crime with which he stands charged; and in the United States vs. Cook, 17 Wall. 174, that every ingredient of which an offence is composed must be accurately and clearly alleged. It is an elementary principle of criminal pleading that where the definition of an offence, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment should charge the offense in the same generic terms as in the definition, but it must state the species, it must descend to particulars. 1 Arch. Cr. Pr. & Pl. 291. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against the further prosecution for the same cause, and second, to inform the court of the facts alleged so that it may decide whether they are sufficient in law to secure a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of crime and intent, and these must be

set forth in the indictment with reasonable particularity of time, place and circumstances."

It was exceedingly well said by his Honor, Justice Brewer, in the Circuit, U. S. vs. Morrissey, 34 Fed. Rep. page 151. "It is a familiar rule of criminal practice and pleading that nothing is taken by intendment. The fact must be charged and charged distinctly."

Now, by again referring to the brief of counsel for the United States, it will be found on page 3 that he admits three distinct offences were joined in this one count, quoting from that brief; first, "unlawfully and with force of arms, seize, carry away and secrete the ballot box containing the ballots; second, then and there knowingly aid and assist in the forcible and unlawful seizure of, carrying away and secreting of said ballot box; third, did then and there counsel, advice and procure divers other persons, whose names are to the grand jurors unknown, so to seize, carry away and secrete said ballot box," very clearly charging the defendant as principal and as accessory. In the first place, we lay down the proposition broadly, that the common law crime defined as accessory after the fact is utterly unknown in prosecutions under United States statutes, and by comparing this indictment with the instruction given and the jurors' finding, it will be perfectly clear that upon the scope of the indictment, was predicated an instruction following which the jurors were justified in finding a verdict, which may have included this crime. Tried

then by the ordinary canons of construction, to be applied to pleading, the defendant was put in a position under the indictment and instructions, of being found guilty of a crime the testimony shows he did not commit, and one unknown to the statutes of the United States. Believing that this indictment was fatally defective in not advising the defendant of the crime for which he would be made to answer in the manner so often pointed out by this court, in the interest of a fair trial, a motion to quash was interposed, before the case was put to the jury, and a motion in arrest after the finding, both of which were predicated, upon grounds that were clearly defined and to which it seems to us, the indictment was amenable.

It does not make any difference that the punishment is the same. The question is not one of punishment, but one of proper technical pleading under well established rules, and it is no answer to defendant's complaint, that he was not properly advised of the crime of which he was charged, or of which he might be convicted under the indictment, to say that he would have the same punishment.

Passing, then, to the second assignment of errors predicated upon the trial court's refusal to permit of counsel of plaintiff in error to ask the jurors certain questions.

We may content ourselves in this supplemental brief with an examination ot three questions counsel sought to put to the jurors; they are as follows:

"Q Would your political affiliations or party predilections tend to bias your judgment in this case, either for or against this defendant?

"Q Were you ever at any time a member of what was, and is, known in the city of Denver, county of Arapahoe, and state of Colorado, as the Committee of One Hundred?

"Q Are you a member of any political club, organized for the advancement of the interests of any political party, and if so, what party?"

Now, an examination of folio 28, page 14, of the printed record, advises the court that the first question put by counsel to the jurors intended to elicit from them such information as would guide counsel in an intelligent exercise of his right of peremptory challenge, brought from the court a ruling which not only excluded that question, but forced counsel to prepare in writing for submission to the court the questions he sought to ask the jurors. This counsel did, and the list of questions submitted to the court, and which questions counsel desired to put to the jurors will be found at folio 29.

Whatever may be said of some of the questions, certainly the three we have here quoted were such as the plaintiff in error clearly had the right to ask the jurors, and indeed it would seem that when plaintiff in error tendered his bill of exceptions, after his motion for a new trial had pointedly called the attention of the court to the refusal at the trial to allow these questions to be put, and which motion

had been overruled, the court inserted in the bill of exceptions a memorandum as follows:

"The matters here recited occurred in the morning hour of the court. The questions given below were presented after lunch time, and while the examination of jurors was still in progress. The court did not then observe the character of the fourth question. If attention had been directed to that question it would have been allowed."

Manifestly, this ought not to be offered as an execuse for the error of the trial court in excluding these questions. This court will notice that the trial court peremptorily refused to allow counsel to put these questions to the jurors at all, leaving no other alternative than to write out the questions and submit them to the court. This he did, and if the action of the court in excluding any one of these questions was injurious to the suitor's right, the court's failure to carefully inspect the questions submitted is all the more reason why complaint should be made of the error.

It would seem that counsel for the goverment insists that even had the question been permitted, the answers elicited would have afforded no ground of challenge for cause. Suppose we concede that a direct answer to all of these questions might not have disclosed ground of challenge for cause, yet, it follows, necessarily, that by permitting the question and pursuing the interrogation, sufficient ground might have been disclosed to justify the court in

sustaining the peremptory challenge. But we insist that the rights of the suitor to purge the jurors, make them witnesses from whom information can be obtained upon which a peremptory challenge can be predicated, is just as much a right in fair trial as the right to challenge for cause. The doctrine is now too well settled for pedantic and copious citation of authorities, that the examinations of the jurors on their *voir dire* for the purpose of advising an intelligent peremptory challenge, can no more be invaded than to question the right of challenge to the array or challenge for cause.

Indeed, by an examination of the Illinois and California cases cited in the main brief, it will be found that this right is distinctly recognized, and in putting questions of this character to the jurors, the courts say, that they are not only proper as a guide to an intelligent peremptory challenge, as well as to disclose, if possible, grounds of challenge for cause, and that the refusal to permit this class of interrogation, is plain error.

It seems that counsel for the government finds some comfort in the fact that in none of the cases cited were the questions rejected tendered for the purpose of eliciting any information as to the political faith of the jurors, but the real point in the matters we have quoted, is overlooked or evaded in this position, for that the principle of law for which we contend, is identical with that set down in the cases to which we have cited the court, and is, that the suitor is entitled to purge the consciences of the

jurors of any matter that if disclosed would tend to make them an unfair or a partial trier of the fact, and it necessarily follows that if this question with reference to an organization like a committee of safety in this city really existed, and any of these jurors belonged to it and by reason of their pledges or obligations to that organization they were not unbiased or unprejudiced, then the plaintiff in error had the most unquestioned right to discover that state of facts, follow it up and show, if he could, that the juror's unfairness or prejudice was ground for peremptory challenge, and even though the jurors might say that upon the law and the evidence notwithstanding his connection with such organization or association he could fairly try the case, and thus pass over the right of challenge for cause, plaintiff in error could then, through his counsel have exercised intelligently the right of peremptory challenge.

There are some additional reflections on the instruction of the court that we are minded to set down here in the light of what is said in the brief of counsel for the government. It will appear by an examination of the charge, or that portion of it which is found on page 24 of the record, that the Honorable trial Judge in commencing his instructions, so mingles what he gives as his own view of the law with what he says is the position of counsel for the government at the trial that it was impossible for the jurors in the hurry of the trial and listening to an oral instruction to segre-

gate, even if the court intended they should do so, that portion of the charge which gave the judge's view of the law from what he said was the district attorney's position, and we now insist that so far from detracting from what we claim is the error contained in this assignment, the reference by the court to the position contended for by the district attorney, makes the instruction all the more hurtful and improper. Passing over, for the time being, any verbal criticism of the law as laid down in this paragraph of the instruction as quoted above, that the average listener to an instruction of this kind would naturally and necessarily conclude that the position taken by the district attorney was approved by the court and the jurors were led to understand that the court concurred with counsel for the government in the inference that he sought to have the jury draw from the circumstances which were detailed. Take this paragraph of the instruction: "The box being found, as it is alleged, in his possession, some two hours or more after that time, it must be assumed from the circumstance that he was cognizant of the manner in which, and of the person by whom it was taken."

Suppose he was. It was no crime for him to know who took it, nor the manner in which it was taken, and even though he had confessed in the trial that he saw it taken, knew who took it and knew where it was taken, and received it from the person who had taken it away, this constituted no

crime under the law, nor could he be convicted by reason of the fact. To convict him, under the law, he must have advised the taking before that event took place, or must have taken it himself, and he should have been separately charged in several counts of the indictment, if the government desired to prosecute him on one or the other of these theories of guilt, that of having taken it or having advised or procured it to be taken, but having accused him on one count of both of these offenses, then when the court comes to instruct the jury they are told, in terms, and they have a right to infer from the language used by the court, that no matter how it came into his possession, that it was distinctively proof of guilt; no matter how he knew who took it, or when he discovered the fact as to who did take the box, or where it was taken, or who had it in possession, that all such knowledge was guilty knowledge, and related back to the original charge, of taking or advice or aid in bringing about the seizure of the box.

In other words, that the instruction taken all through is so confusing and states such erroneous rules of law as to mislead and misdirect the jury, taking them away from the real issue upon which the defendant should have been tried, even had the indictment been properly drawn.

As we hope the case will be set down for re-argument, we will not tax the court with an extended printed supplement, but will attempt, in the discus-

sion of the case before the court, to more amplify some of these matters, treating this supplement merely as a memorandum to that end.

Respectfully submitted,

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